IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA331/2020
[2022] NZCA 129

BETWEEN	NORTHLAKE INVESTMENTS LIMITED Appellant
AND	OTAGO REGIONAL COUNCIL Respondent

Hearing:	13 October 2021
Court:	Cooper, Brown and Goddard JJ
Counsel:	A F Pilditch QC for Appellant L J Taylor QC and N M Laws for Respondent
Judgment:	12 April 2022 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Substantial earthworks on the appellant's (Northlake's) subdivision development near Wanaka had been largely completed, with most of the land topsoiled but unvegetated, when heavy rainfall on 17 and 18 August 2017 caused flooding at the site. Sediment escaped, eventually reaching the Clutha River more than a kilometre away.

[2] Northlake was charged under the Resource Management Act 1991 (the RMA) with discharging contaminants onto land in circumstances which might have resulted in their entering water, namely the Clutha River. Northlake was convicted in the District Court[1] and its appeal to the High Court was dismissed.[2] It appeals pursuant to leave granted by this Court.[3] The focus of Northlake's argument concerns the liability under the RMA of a developer who contracts out construction works and relies on expert advice.

Statutory scheme

[3] The purpose of the RMA is to promote the sustainable management of natural and physical resources.[4] Among the duties and restrictions in pt 3 of the Act, s 15 relevantly provides:

> **15 Discharge of contaminants into environment**
>
> (1) No person may discharge any—
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> …
>
> (b) contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water; or
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> …
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> unless the discharge is expressly allowed by a national environmental standard or other regulations, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent.

[4] The RMA definition of the verb "discharge" includes to emit, deposit or allow to escape.[5] As this Court explained in *McKnight v NZ Biogas Industries Ltd*, the extension of the definition of discharge to allowing escape suggests something broader

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1 *Otago Regional Council v Northlake Investments Ltd* [2019] NZDC 11710 [District Court judgment].
2 *Northlake Investments Ltd v Otago Regional Council* [2020] NZHC 1144 [High Court judgment].
3 *Northlake Investments Ltd v Otago Regional Council* [2020] NZCA 567 [Leave judgment].
4 Section 5.
5 Section 2(1).

than direct action by the person.[6] The Court recognised that a discharge may be either active or passive, stating:[7]

> We find no straining of language in saying that a person allows a contaminant to escape who fails to take the precautions that a reasonable prudent person in the position would take to prevent that escape.

[5] A contravention of s 15 of the RMA is rendered an offence by virtue of s 338 which relevantly provides:

> **338 Offence against this Act**
>
> (1) Every person commits an offence against this Act who contravenes, or permits a contravention of, any of the following:
>
> (a) sections 9, 11, 12, 13, 14 and 15 (which impose duties and restrictions in relation to land, subdivision, the coastal marine area, the beds of certain rivers and lakes, water, and discharges of contaminants):
>
> …

[6] With reference to proof of a contravention of s 15, s 341 provides:

> **341 Strict liability and defences**
>
> (1) In any prosecution for an offence of contravening or permitting a contravention of any of sections 9, 11, 12, 13, 14, and 15, it is not necessary to prove that the defendant intended to commit the offence.
>
> (2) Subject to subsection (3), it is a defence to prosecution of the kind referred to in subsection (1), if the defendant proves—
>
> (a) that—
>
> (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 or avoiding an actual or likely adverse effect on the environment; and
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> (ii) the conduct of the defendant was reasonable in the circumstances; and
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> (iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or

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6 *McKnight v NZ Biogas Industries Ltd* [1994] 2 NZLR 664 (CA) at 669.
7 At 672.

(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.

(3) Except with the leave of the court, subsection (2) does not apply unless, within 7 days after the service of the summons or within such further time as the court may allow, the defendant delivers to the prosecutor a written notice—

(a) stating that he or she intends to rely on subsection (2); and

(b) specifying the facts that support his or her reliance on subsection (2).

[7] In the course of its analysis of these provisions, this Court in *Biogas* observed:[8]

> Section 15(1) contemplates discharge by a person. The definition extends the meaning to include emit and allow to escape. The former suggests that it therefore encompasses the consequence of activities carried out by a person — it would be absurd to suggest that it is confined to such contaminants as are personally emitted. Moreover the extension to allowing escape suggests something broader than direct action by the person.
>
> The discharging to which the section relates must also extend to activities to which the statutory defences can have application. They extend to events giving rise to discharge beyond the control of the defendant including natural disaster, mechanical failure and sabotage and which could not reasonably have been foreseen or been provided against.
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> A person may discharge contaminant within s 15(1) though not intending to do so. That follows from s 341(1) which says that it is not necessary for intention to be proved. Any requirement that the person foresee, or be aware of, the discharge would not be consistent with the available defences. It is difficult therefore to see room for any mental element in the act of discharge.
>
> Plainly however a person could not be said to discharge the contaminant unless there is a causal connection between the person and the discharge. Even this causative element, however, is to be considered in light of the statutory defence available of proof that the offence was due to an event beyond the control of the defendant that could not reasonably have been foreseen or been provided against.

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8 *McKnight v NZ Biogas Industries Ltd*, above n 6, at 669.

[8] The Court referred to Lord Wilberforce's discussion of the term "causes" in *Alphacell Ltd v Woodward*:[9]

> In my opinion, "causing" here must be given a common sense meaning and I deprecate the introduction of refinements, such as causa causans, effective cause or novus actus. There may be difficulties where acts of third persons or natural forces are concerned but I find the present case comparatively simple. The appellants abstract water, pass it through their works where it becomes polluted, conduct it to a settling tank communicating directly with the stream, into which the polluted water will inevitably overflow if the level rises over the overflow point. They plan, however, to recycle the water by pumping it back from the settling tank into their works: if the pumps work properly this will happen and the level in the tank will remain below the overflow point. It did not happen on the relevant occasion due to some failure in the pumps.
>
> In my opinion, this is a clear case of causing the polluted water to enter the stream. The whole complex operation which might lead to this result was an operation deliberately conducted by the appellants and I fail to see how a defect in one stage of it, even if we must assume that this happened without their negligence, can enable them to say they did not cause the pollution. In my opinion, complication of this case by infusion of the concept of mens rea, and its exceptions, is unnecessary and undesirable.

[9] With reference to that analysis this Court in *Biogas* concluded:[10]

> It is difficult to postulate a causative link between the person and the discharge appropriate for s 15(1) any different from that. This means that because of its context the word discharge is to be construed as extending to cause to discharge. That accords with the natural and ordinary meaning of discharge as engaging in an activity which results in the emission or discharge of contaminant. It is consistent with the policy of the provisions to prevent contamination of waterways.

[10] Notwithstanding the fact that Northlake was charged directly with contravention of s 15 under s 338, its appeal focuses to a significant degree on another section, namely s 340, which addresses the liability of principals for the acts of agents:

> **340 Liability of principal for acts of agents**
>
> (1) Where an offence is committed against this Act—
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> (a) by any person acting as the agent (including any contractor) or employee of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the

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9 *Alphacell Ltd v Woodward* [1972] AC 824 (HL) at 834–835 which concerned the meaning of the phrase "if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter" in s 2(1)(a) of the Rivers (Prevention of Pollution) Act 1951 (UK).

10 *McKnight v NZ Biogas Industries Ltd*, above n 6, at 670.

same extent as if he, she, or it had personally committed the offence; or

…

(2) Despite anything in subsection (1), if proceedings are brought under that subsection, it is a good defence if—

(a) the defendant proves,—

…

(ii) in the case of a person other than a natural person,—

(A) that neither the directors (if any) nor any person involved in the management of the defendant knew, or could reasonably be expected to have known, that the offence was to be or was being committed; or

(B) that the defendant took all reasonable steps to prevent the commission of the offence; and

(b) the defendant proves that the defendant took all reasonable steps to remedy any effects of the act or omission giving rise to the offence.

[11] As this Court observed in *Biogas*:[11]

> A company therefore may commit the offence by doing* the prohibited act (a person is defined to include a body corporate), by permitting the contravention or as principal or employer of the person or persons who actually commit the offence.

In that case, as in the instant appeal, the company was charged directly, not vicariously, with the prohibited act of discharging a contaminant.

[12] In seeking leave to bring a second appeal, Northlake emphasised that in undertaking its development it had obtained and acted upon advice from experts, a factor which it claimed distinguished its case from *Biogas*. Northlake's broad contention was that a defendant who reasonably relies on such expert advice cannot be liable for a contravention of s 15.

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11 *McKnight v NZ Biogas Industries Ltd*, above n 6, at 668.

* Actively or passively.

[13] This proposition, together with the potential application of s 340, was reflected in the following three issues identified in the judgment granting leave to appeal:[12]

> (a) Is a developer liable under s 15, as an active or passive discharger, if it acted reasonably in engaging expert advice and in relying on it?
>
> (b) If a developer is relying on expert advice to address the risk of discharge, does the developer's liability potentially arise under ss 15 or 340 or both?
>
> (c) Did Northlake act reasonably in engaging expert advice and in relying on it?

Factual background

Northlake's property

[14] Northlake owns a property at Aubrey Road near Wanaka comprising 108 hectares in total which is contained in the Northlake Special Zone of the Queenstown Lakes District Council (QLDC) operative district plan. As Judge Dwyer in the District Court explained, a feature of the property relevant to the appeal is a natural flowpath (the flowpath) running through the southern portion of the land from west to east:[13]

> At its eastern end the flowpath (which had been re-routed through the Property as part of the subdivision works) terminates at Outlet Road at a point where it is piped underneath the road (which forms the eastern boundary of the Property in this vicinity) and discharges on the other side of the road onto land owned by Exclusive Developments Limited (EDL). The flowpath then runs through the EDL land and an adjoining DoC reserve to the Clutha River. I understand the distance of the flowpath from Outlet Road to the Clutha River to be somewhere in the order of 1–1.5 kms.

The subdivision development

[15] In 2016 and 2017 Northlake sought and obtained resource consents[14] from QLDC allowing it to undertake a subdivision and bulk earthworks at the southern end of the property (the earthworks consents). A subdivision consent[15] was granted on

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12 Leave judgment, above n 3, at [17].
13 District Court judgment, above n 1, at [6].
14 RM160186 granted on 9 May 2016 and RM161127 granted on 14 February 2017, referred to collectively as the "earthworks consents".
15 RM160509.

29 September 2016 involving a total area of some 25 ha for a subdivision, including 107 residential lots.

[16] Both of the earthworks consent applications addressed the related issues of dust control measures and sediment and erosion control measures. Those matters, as the District Court Judge noted,[16] are of considerable significance for the property because its sub-topsoil layer of earth largely comprises Loess/Loess Colluvium, a fine earth material which is readily mobilised as dust in dry conditions or waterborne sediment in wet conditions.

[17] As the Judge explained:[17]

> In short the earthworks consents applications recognised that for dust and sediment management purposes, it was important that bulk earthworks were staged to minimise the area of work which was open at any time and that as lots were developed they would be re-topsoiled and seeded/fertilised to establish a stabilising vegetative cover. The methodology for undertaking these works would be set out in a site management plan (SMP) which would be submitted by the contractor.

[18] A site management plan (SMP) in accordance with the requirements of RM160186 was prepared by Northlake's construction contractor, Civil Construction Limited (CCL), and submitted by Northlake to QLDC for approval in early July 2016. The SMP approved on 14 July 2016 contained provisions concerning dust control, erosion control and vegetation. The Judge concluded that by 17 August 2017, the date of the alleged offending, there would have been "open", in the sense of being unvegetated, an area of topsoil and Loess Colluvium comprising at least 15–20 ha.[18]

The July and August incidents

[19] It appears that July and August 2017 were particularly wet months in the region.[19] As a result of the rainfall there was a discharge of sediment from the property

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16 District Court judgment, above n 1, at [9].
17 At [10].
18 At [18].
19 The District Court Judge referred to the evidence of Mr Dent, a civil engineer with specialist experience in storm water and flood management engineering, who gave evidence for Northlake that the rainfall for those two months was 214 per cent and 144 per cent, respectively, of the average monthly rainfall, in a period of the year when there was very little drying due to cool temperatures and short days: at [20].

on 17 July 2017 via the Outlet Road culvert onto land owned by Exclusive Developments Limited (EDL), immediately to the east. In light of this discharge, various amendments were made to the SMP, including temporary restrictions (boards) over outlet pipes and silt retention ponds, construction of silt fences on the EDL land and the installation of some temporary silt fences in stage 3 of the subdivision.

[20] The rainfall giving rise to the charge occurred on 17 and 18 August 2017. As the Judge explained:[20]

> [31] The rain on 17 and 18 August picked up earth (silt and sediment) from the open areas on the Property and carried it into the flowpath and stormwater systems established as part of the subdivision works. An admission of facts filed in these proceedings contains the following statement:
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> > 15 On 17 and 18 August 2017 there was a discharge of water containing sediments from the Northlake site. Near surface soils (to 15m) at the Northlake site were found in 2016 to comprise loess and loess colluvium underlain by glacial outwash and glacial till.
> >
> > 16 The discharge travelled through the culvers in Reserve 1003, under Outlet Road, over the Hikuwai and DOC lands, and into the Clutha River. In making this admission the defendant accepts that some sediments from its site entered the Clutha River. It does not accept that all the sediment that entered the Clutha River between 17–18 August 2017 came from the Northlake site.

It is the incident described in paras 15 and 16 of the admission of facts which formed the basis of the charge against Northlake.

The charge

[21] The charge was framed as follows:

> Northlake Investments Limited together with Civil Construction Limited discharged contaminants (silts and sediments) onto land in circumstances which might have resulted in those contaminants (or any other contaminants emanating as a result of natural processes from those contaminants) entering water, namely water in the Clutha River, when the discharge was not expressly allowed by a National Environmental Standard or other regulations, a rule in a Regional Plan as well as a rule in a Proposed Regional Plan for the same region (if there is one), or a resource consent.

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20 District Court judgment, above n 1 (footnotes omitted).

Legislative reference: Sections 15(1)(b), 338(1)(a) and 339 of the Resource Management Act 1991 and Section 66 of the Crimes Act 1961.

The District Court decision

[22] Mr Dent, a civil engineer who possesses specialist experience in storm water and flood management engineering, gave evidence for Northlake and was cross-examined on the subject of silt fences. Relying in part on the responses of Mr Dent during cross-examination, the Judge reached the view that the following combination of factors clearly pointed to there being problems, or at least potential problems, as at the end of July 2017 in respect of silt and sediment management on the works area of the property:[21]

- The subdivision works area of somewhere in the range 15–20 ha was open (in the sense of being unvegetated) and had been open for a period of two to three months or so, notwithstanding the clear recognition in resource consent documents that the areas of open land had to be minimised and vegetation established as part of staged subdivision works.
- The weather had been particularly wet during July.
- Ground conditions in the works area were accordingly wet.
- There had been a discharge of silt and sediment laden stormwater from the Property into the flowpath on the adjoining EDL land.
- Some amendments to the SMP had been put in place.

The Judge recorded that nothing in the evidence remotely suggested that the rainfall events in July and August 2017 were within a range which might not reasonably have been foreseen, therefore precautions in relation to such events might need to be taken from time to time.[22]

[23] Northlake argued that it took the reasonable precautions of a prudent developer to prevent the discharge. It maintained that the prosecution could not prove beyond reasonable doubt that Northlake, acting through its advisers, failed to investigate the possibility of sediment discharge into the Clutha River and take appropriate preventative measures.

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21 District Court judgment, above n 1, at [27]–[28].
22 At [30].

[24] The Judge concluded that Northlake was responsible both as an active and passive discharger in contravention of s 15(1)(b).[23] He was satisfied beyond reasonable doubt that Northlake had not in fact taken the reasonable precautions of a prudent developer to prevent the discharge of sediment from the property and that, having an awareness that sediment could discharge into the Clutha River, it had not investigated and taken proper preventative measures.[24] While accepting that a developer might reasonably expect to rely on advice from its professional advisers and contractors, the Judge did not consider that was the end of the matter, nor that it necessarily shielded Northlake from liability.[25]

[25] The Judge amended the charge by deleting the words "together with Civil Construction Limited" and the reference to s 66 of the Crimes Act 1961. While finding that both Northlake and CCL committed offences against s 15, the Judge considered they played different roles in the chain of causation and contributed to the discharge in different ways. Hence both were independently liable for what occurred.[26]

The High Court decision

[26] On appeal Northlake argued that the charges ought to have been brought under s 340 because Northlake's liability was essentially "vicarious" in nature. Northlake maintained that it did not contribute to the physical events charged under s 15, which were entirely the province of CCL, and claimed to be entitled to a finding that both limbs of the defence in s 340 were established.

[27] Clark J considered that, because at trial Northlake ran the defence that it took all reasonable care, the formulation of the charge had little bearing on the outcome of the appeal. She said:[27]

> [30] A person, other than a person who actually (i.e physically) causes a discharge, may also cause a discharge through acts or omissions that indirectly contribute to that discharge. This is captured by the language of s 340. No miscarriage arises from the fact that Northlake was treated as though it "personally committed" the offence of discharging sediment into the

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23 At [73].
24 At [58].
25 At [70].
26 At [77].
27 High Court judgment, above n 2 (footnotes omitted).

> Clutha River. Ultimately, the appeal turns on the Judge's evaluation of the evidence as to the steps Northlake took to prevent a discharge and the sufficiency of those steps, not the formulation of the charge.

[28] The Judge considered that although QLDC did not provide guidance on the level of rainfall for which a developer must prepare, that did not mean that the trial Judge imposed a retrospective standard by entering a conviction, explaining:

> [45] … Section 15 of the RMA is an independent obligation on a developer over and above any rules or guidance provided by a local council. Ultimately, the developer's obligation as consent holder is not to discharge any contaminant into water. To avoid causing a discharge, a developer must take all reasonable precautions as a prudent developer. The fact alone that a developer relied on its contractors to make relevant decisions does not alter that obligation. In this case, as [the prosecutor] pointed out, the appellant, through its manager, was engaged with the contractors on the central question of silt control and the site problems in that regard.
>
> [46] It was therefore open to the Judge to conclude the SMP was not adequately updated and that Northlake failed to take all reasonable steps to prevent the discharge.

[29] The appeal was dismissed.

The scope of the instant appeal

[30] Section 240(2) of the Criminal Procedure Act 2011 (CPA) provides that the second appeal court must allow the appeal if satisfied that the appeal should be allowed on any of the grounds described in s 232(2) of the CPA, relevantly:

> (a) the Judge erred in the assessment of the evidence to such an extent that a miscarriage of justice has occurred;[28] or
>
> (b) in any case a miscarriage of justice has occurred for any reason.[29]

The second appeal court must dismiss the appeal in any other case.[30]

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28 Section 232(2)(b).
29 Section 232(2)(c).
30 Section 240(3). Section 232(2)(a) is not relevant for this appeal, as Northlake was convicted following a Judge-alone trial.

[31] Addressing the formulation of the issues in the leave judgment,[31] Northlake's submissions explained:

> The first two questions raise issues about the nature of RMA liability under ss 338 and 340 for which there is confusion and uncertainty in the cases to date. These issues of law require clarification, before the third question can be answered. These submissions will address the current state of the law, the first two questions collectively.

[32] Northlake maintained that the first two questions correctly identified that when a contravention of s 15 is alleged, ss 338 and 340 involve distinct types of criminal liability. It mounted an attack on the contrary conclusion in *Fulton Hogan Ltd v Canterbury Regional Council* as being wrong in principle.[32]

[33] However, as Mr Taylor QC for the respondent dryly observed, not only did Northlake's submissions conflate issues (a) and (b), they also provided no direct answer to either of them. So far as the latter relating to s 340 is concerned, he submitted that it raised a purely academic question given the context of this appeal. To comprehend that submission it is necessary to briefly revisit the course of the litigation.

[34] Although Northlake was charged under s 338 for a contravention of s 15, Northlake invited the trial Judge to also consider its liability under s 340. Mr Pilditch QC's submissions in this Court explained the implications of invoking s 340:

> The only elements the prosecution must prove is that the contravention occurred, and it was caused by the agent of the defendant (whether or not the defendant causally contributed to the contravention or not). In the present case all that would have [been] required of the prosecution was to produce the certificate of conviction of the co-defendant CCL and establish the agency relationship. Both facts were admitted by [Northlake]. [Northlake] was guilty unless it could establish the statutory defence.
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> (Footnote omitted.)

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31 Reproduced at [13] above.

32 *Fulton Hogan Ltd v Canterbury Regional Council* [2019] NZHC 1767, [2019] NZRMA 642. Several other decisions touching on s 340 were also discussed in Northlake's submissions: *Sandstone Dairy Ltd v Southland Regional Council* HC Invercargill CRI 2007-425-000001, 15 May 2007; *Ruki v Bay of Plenty Regional Council* [2020] NZHC 669; *Bay of Plenty Regional Council v Rerewhakaaitu Farm Ltd* [2020] NZDC 22184; and *Bay of Plenty Regional Council v CPB Contractors Pty Ltd* [2021] NZDC 6000.

[35] It transpired however that the reason for such apparent altruism was, as the Judge's decision recorded,[33] Northlake's concern that the prosecution's omission to invoke that provision had the consequence that Northlake was precluded from availing itself of the defence contained in s 340(2)(a)(ii),[34] namely lack of knowledge of the offence and the taking of all reasonable steps to prevent its commission.

[36] One might wonder how Northlake's situation could be improved by the addition of a further charge under a different provision (s 340) in order to avail itself of a defence which is specific to that provision (s 340(2)(a)(ii)). The answer is to be found in Northlake's appellate strategy, which was to highlight what in its view was the comparative unfairness of its being required to face a charge of active discharge without the ability to defend such a charge by reliance on the reasonableness of its conduct.

[37] During an exchange with this Court, Mr Pilditch sought to contrast the approaches to prosecutions under the different sections. He argued that there is a reasonableness defence available if a defendant is charged under s 340 or with passive discharge under s 338, yet not if the defendant is charged with active discharge under s 338. It was Mr Pilditch's view that it was not just and principled for the availability of the reasonableness defence to depend upon the framing of the charge by the prosecution, where there is no factual difference. He asked:

> … how is it that if the prosecution say it is active you cannot rely on [reasonableness] but if it is allowing or they file it under s 340 you can?

[38] The short answer to Mr Pilditch's cri de cœur is that the structure of the RMA offence provisions and the narrowly-drawn scope of the statutory defences are as the legislature has decreed. It is not possible, by the addition of a charge under s 340, to cross-pollinate charges under other provisions with defences that are specifically confined to s 340. Nor can an argument be mounted that there is some abuse of process on the part of a charging authority which elects not to invoke s 340 and, in Northlake's eyes, thereby deprives a defendant of the s 340(2) defence.

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33 District Court judgment, above n 1, at [79].
34 See [10] above.

[39] In our view the instant appeal does not engage s 340, either specifically or in some analogous way. We think it undesirable to be drawn into an obiter analysis of that provision and in so doing to engage with the attack mounted by Mr Pilditch on *Fulton Hogan Ltd v Canterbury Regional Council*.[35]

[40] Consequently we accept Mr Taylor's submission that issue (b) is academic in the context of the instant appeal, where the charges were brought under ss 15 and 338 only and embraced both active and passive discharge. We turn to address the other issues, the first of which is framed as one of general principle while the latter is tied to the particular circumstances of this case.

Issue (a): Is a developer liable under s 15, as an active or passive discharger, if it acted reasonably in engaging expert advice and relying on it?

[41] The rationale for this question was explained in the Leave judgment as follows:[36]

> The Court in *Biogas* did not need to address whether a defendant is liable under s 15 if they reasonably rely on expert advice. The present case, unlike *Biogas*, involves a case where the defendant engaged expert advice. The issue is whether a defendant is liable under s 15, whether as an active or passive discharger, if it acted reasonably in engaging expert advice and in relying on it. As this issue was not squarely addressed in the lower courts, we consider leave should be granted.

[42] Mr Taylor was critical of the form of the question, submitting that the only answer could be: it depends on the facts. Arguing that the question is too hypothetical and hence incapable of a useful answer, he proposed the following alternative question:

> Whether, in light of the lower courts' findings of fact, it was open for them to find that [Northlake] contravened s 15 (and committed an offence via s 338) RMA, even if [Northlake] reasonably engaged expert advisers and contractors and followed their advice.

[43] While we have some sympathy with that criticism, Mr Taylor's alternative question tends to merge the general proposition with the particular facts of this case. In our view the line between the two was better drawn by the form of two questions

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35 *Fulton Hogan Ltd v Canterbury Regional Council*, above n 33.

36 Leave judgment, above n 3, at [16].

which Mr Pilditch identified (albeit he proposed that they both be addressed in issue (c)), namely:

(a) Whether a developer reasonably relying on experts could ever be guilty of a s 15 contravention?

(b) Whether Northlake, if it reasonably relied on experts, should have been found guilty of this s 15 contravention?

The former neatly captures the essence of the original issue (a).

[44] Mr Pilditch submitted that, when a developer engages third party experts to design earthworks, implement those works and monitor them for RMA compliance, liability for a contravening discharge could only arise either under the passive limb identified in *Biogas* or under s 340. Mr Pilditch argued that a developer like Northlake cannot be directly liable, because the "direct causes" of the discharge rest with a third party whose actions are not attributable to the developer.[37] Hence he contended that in the instant case, if Northlake could be liable at all, it could only be either on the alternative passive basis of failing to take the precautions that a reasonable prudent developer would take in these circumstances, or under s 340.[38]

[45] Mr Taylor rejected that submission as contrary to the philosophy of the RMA, noting it was rejected by Judge Sheppard at first instance in *Biogas* where his Honour said:[39]

> It was the defendant which engaged the contractor to make the excavation. It was the defendant's project, and it cannot avoid responsibility by pointing to the contractor engaged to provide a machine and operator to make the excavation at [the defendant's] direction.

[46] Mr Taylor submitted that Northlake's argument amounted to the proposition that putting contracts in place for the completion of certain work shields a developer from RMA liability, effectively allowing a developer to delegate its obligations under

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37 Citing *Cullen v R* [2015] NZSC 73, [2015] 1 NZLR 715.

38 The latter of which, as discussed above at [34]–[37], was in Mr Pilditch's view the "logical choice" in this case because of the contractor/agency relationship.

39 *McKnight v NZ Biogas Industries Ltd* DC Auckland CRN-204-802-4849, 5 July 1993 at 9.

the RMA by contracting with third parties. He contended that there was nothing in the RMA which supports such a proposition, which is contrary to its purpose and inconsistent with its enforcement provisions.

[47] It is helpful to distinguish between active and passive discharges although they may of course be contemporaneous. In the case of an alleged active discharge, it is our view that the key issue is simply one of causation. If it is shown that a defendant is a cause of a discharge then, subject to the s 341 defences, the defendant will contravene s 15(1) irrespective of whether there has been reasonable reliance by a developer on a third party contractor. As this Court observed in *Biogas*:[40]

> Once it is accepted that to discharge in s 15(1) includes to cause to be discharged, the present case is indistinguishable from the *Alphacell Ltd* case. Just as in that case the failure of pumps to prevent overflow from settling tanks led to the discharge of polluted water into the river, so in this case the failure of the excavation to contain the bladder led to the contaminant flowing by way of the drain into the stream.

[48] Mr Pilditch viewed the ratio of *Biogas* as being that the defendant was liable through the actions of its managing director in personally directing the machine operator (who was digging a hole) to also dig a trench and install a drain for water that might seep into the excavation. The excavation, which NZ Biogas Industries "directly caused", failed and caused the discharge. Hence the defendant was guilty on orthodox attribution principles.

[49] However this Court went on to supplement the passage above in the following way:[41]

> Even more directly in this case, on the findings of the Judge, the manner in which the bladder was installed by or under the supervision of the respondent ultimately led to the discharge. The operations which the respondent was in a position to control caused the discharge.

[50] The point which emerges is that the requisite causal link can exist absent a personal direction of the kind in *Biogas*. As the Court said, the causal link between the person charged and the discharge will be an issue of fact in every case.[42] Given

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40 *McKnight v NZ Biogas Industries Ltd*, above n 6, at 672.
41 At 672.
42 At 671.

Mr Pilditch's emphasis on "direct causes" it is timely to recall both Lord Wilberforce's observation that "causing" must be given a common sense meaning, without the introduction of refinements such as causa causans, effective cause or novus actus,[43] and this Court's adoption of his reasons.[44]

[51] We consider that if a causal link is demonstrated to exist between a defendant and a discharge, then the consequence of s 341 is that the defendant will be guilty of an active discharge unless the defences in s 341 can be invoked.

[52] Turning to the scenario of an alleged passive discharge, this Court in *Biogas* explained:[45]

> We find no straining of language in saying that a person allows a contaminant to escape who fails to take the precautions that a reasonably prudent person in the position would take to prevent that escape. The element of awareness in the concept of allowing is broader than that adverted to in the Courts below. It is sufficient if there is awareness of facts from which a reasonable person would recognise that escape could occur. In that case, failure to investigate and take appropriate preventive steps would amount to allowing an escape should it subsequently occur.

[53] Again, the answer to the reformulated question, whether a developer reasonably relying on experts *could ever* be guilty of a s 15 contravention, will be fact specific. As Mr Pilditch observed in his argument on s 340, the prosecution has the onus of proving the failure to take such precautions. If a developer had engaged and appropriately acted upon relevant expert advice, the prosecution may well have difficulty in discharging that onus. But, as Mr Taylor rightly said, it depends on the facts.

[54] Consequently, in respect of both active and passive discharges the answer to the reformulated question must be yes. A developer reasonably relying on experts could nevertheless be guilty of contravening s 15, depending on the particular facts of the case before the court.

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43 *Alphacell Ltd v Woodward*, above n 9, at 834.
44 *McKnight v NZ Biogas Industries Ltd*, above n 6, at 672.
45 At 672.

Issue (c): Did Northlake act reasonably in engaging expert advice and relying on it?

[55] Mr Pilditch maintained that this question correctly framed the central issue which should have been addressed in the lower courts. However the question is predicated on a negative response to issue (a). It assumes that reasonable reliance on expert advice is the sole determinant of liability in cases such as that of Northlake, a proposition we have rejected. In our view where as here the inquiry is whether a miscarriage of justice occurred, Mr Pilditch's reformulated second question is more apt, namely whether Northlake, if it reasonably relied on experts, should have been found guilty of a s 15 contravention.[46]

[56] Mr Pilditch reprised his theme that reasonable reliance on expert advice necessarily defeats a prosecution under s 15(1). Contrasting the present case with *Biogas*, he submitted that any developer, like Northlake, that has engaged third party experts to conduct earthworks in a manner that prevents the discharge of sediment is prima facie acting reasonably and prudently. Whereas Biogas Industries failed at the first hurdle of seeking advice on matters that required expertise, Northlake did not. He went on to submit:

> But where a developer has prudently engaged appropriate experts, and is following their expert's advice, the prosecution must prove that the developer's reliance on experts was unreasonable or, putting matters another way, negate any reasonable possibility that the *developer's* reliance on experts was reasonable in the circumstances. Without proof of that there is no proof of the causal nexus. Proving, beyond reasonable doubt, that a developer should not have relied on the advice of experts is a high hurdle because a developer should reasonably be able to engage and rely on expert advice.
>
> Therefore, if a developer has reasonably engaged appropriate experts, followed their advice, and it was reasonable to do so, it is difficult to see room for that developer to be guilty under the passive limb relying on [*Biogas*] and conventional strict liability principles.

[57] Assuming for the purposes of analysis that it would be possible for a developer to have so little knowledge of and physical connection with a development that responsibility for a discharge could be successfully abrogated, the present case is not of that nature. As the trial Judge observed, Northlake was the owner of the property, it personally sought and obtained the resource consents allowing the bulk earthworks

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[46] Set out at [43(ii)] above.

on and subdivision of the property, and it was undertaking those bulk earthworks through its contractor but under the observation of its manager Mr Bretherton.

[58] We see no error in the District Court Judge's conclusion in the following terms:[47]

> [72] There can be no doubt that there was a causal connection between the actions of Northlake and the discharge. At the risk of being repetitive, it was the Property owner, developer and resource consent holder which contracted CCL to undertake the physical works which brought about the discharge. It was actively involved in oversight of the works. As consent holder it was obliged to ensure that silt and sediment controls in accordance with an SMP which was fit for purpose were in place for the duration of the project. In response to a series of questions from [the prosecutor] as to the need to improve the sediment control system after the discharge Mr Bretherton acknowledged that "ultimately it was my responsibility". It was also responsible to ensure that a fit for purpose SMP was in place through the duration of the project and it failed to meet that responsibility.
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> [73] I consider that Northlake's failure in this regard was an operative or effective factor in the chain of causation leading to this discharge and accordingly it might be regarded as falling into the active discharger category identified in *URS* and accordingly discharged the contaminant which entered the Clutha River. If I am wrong in that characterisation and Northlake is considered to be a passive discharger, it nevertheless allowed the discharge to take place because it failed to take the precautions a reasonably prudent developer would have taken to avoid the discharge.
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> (Footnote omitted.)

[59] The conclusion that Northlake did not take the reasonable precautions of a prudent developer was based both on the need for revegetation and staging of the development, and on the inadequacy of the SMP in relation to sediment controls. The judgment of Clark J on appeal contains substantial extracts from the cross-examination of Mr Dent, Northlake's expert witness on water resources engineering.[48] Her Honour concluded that Mr Dent's expert opinion supported the conclusion that it was necessary to prepare for two successive rainfall events of the scale that occurred in August 2017. She considered that a prudent developer would devise a SMP requiring sediment controls which provide that level of protection. She considered that Mr Dent's evidence about the "back-up" nature of the silt fences

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47 District Court judgment, above n 1.

48 High Court judgment, above n 2, at [42]–[43].

constructed after the July 2017 incident suggested that Northlake's sediment controls were inadequate to prevent one heavy rainfall event, let alone two successive events.[49]

[60] In addressing Mr Pilditch's submission that it was "illogical" to suppose that a discharge within a few metres of the Northlake site boundary in July 2017 should have alerted Northlake to an impending discharge into the Clutha River over one kilometre away, the Judge stated:[50]

> [47] … As I have said, it is not so much about whether Northlake should have been alerted, but what this occurrence could be taken to suggest about the state of the sediment controls in place at the time. As Mr Dent accepted, the further controls implemented afterwards amounted to "backup measures" and would do little to compensate for an inadequacy in the primary control system. I do not consider the connection between the July 2017 discharge and the August 2017 discharge to be illogical. Although the scale of the discharge in August was more serious, so were the not unforeseeable weather conditions. The July 2017 discharge was reasonably to be seen as evidence of the underlying weakness of the sediment control system and the susceptibility of the systems that were in place to an event of the kind that occurred on 17 and 18 August.
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> [48] It is the failure of Northlake to insist on a stronger sediment control system, in accordance with the expectations of expert opinion at the time (albeit Northlake says it was not informed of this by its own expert), that prevents Northlake from demonstrating that a miscarriage of justice has occurred.

[61] We do not consider that the conclusions of either Judge are impeached. Indeed on our review of the evidence we agree with them. It follows that we are not satisfied that either of the grounds in s 232(2)(b) or (c) of the CPA are established. Consequently we must dismiss the appeal.

Result

[62] The appeal is dismissed.

Solicitors:
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Ross Dowling Marquet Griffin, Dunedin for Respondent

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49 At [44].
50 High Court judgment, above n 2.