IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA440/2024
[2025] NZCA 252

BETWEEN	GORDON JOHN TURKINGTON First Appellant
	JOHN TURKINGTON LIMITED Second Appellant
	KIM ANDREW SPEEDY Third Appellant
AND	MANAWATŪ-WHANGANUI REGIONAL COUNCIL First Respondent
	THE KING Second Respondent

CA515/2024

BETWEEN	THE KING Appellant
AND	JOHN TURKINGTON LIMITED Respondent

Hearing:	12 May 2025
Court:	Cooke, Venning and van Bohemen JJ
Counsel:	A F Pilditch KC, R C Woods and M J Sargent for Appellants in CA440/2024 and Respondent in CA515/2024 A L McConachy for First Respondent in CA440/2024 Z R Johnston for Second Respondent in CA440/2024 M J Lillico and B D Vanderkolk for Appellant in CA515/2024
Judgment:	19 June 2025 at 11.30 am

JUDGMENT OF THE COURT

A The Crown's application for leave to appeal in CA515/2024 is granted.

B The appeal in CA515/2024 is dismissed.

C The appeals in CA440/2024 are dismissed.

REASONS OF THE COURT

(Given by Cooke J)

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[1] This judgment deals with two sets of appeals arising from the prosecution of John Turkington Ltd (JTL) and associated persons in relation to alleged offences committed in connection with commercial forestry harvesting activities. All relevant charges were either dismissed, or resulted in acquittals following a jury trial. First, the Crown seeks leave to appeal from the decision of the District Court dismissing a charge against JTL at the conclusion of the defence case under s 147 of the Criminal Procedure Act 2011.[1] Secondly, JTL, Mr Gordon Turkington and Mr Kim Speedy

1 *R v John Turkington Ltd* [2024] NZDC 16142 [dismissal decision].

appeal from decisions of the District Court declining to award JTL and Mr Turkington costs under the Costs in Criminal Cases Act 1957, and awarding Mr Speedy $15,000.[2]

Background

[2] The charges were originally filed by the Horizons (Manawatū-Whanganui) Regional Council (the Council), with the Crown assuming responsibility for the prosecution after a jury trial election.

[3] The charges related to alleged environmental impacts arising from commercial forestry harvesting operations in three forests: Jack's Forest, Carver Forest and Findlay Forest.

[4] JTL harvested at Jack's Forest between 1 December 2018 and 1 June 2019. It was alleged that Mr Speedy was the manager in charge of the harvest. In July 2019 the Council raised issues with the way earthworks had been undertaken to install new tracks, the operation of machinery in a stream, the amounts of slash in the waterway, and with overflowing sediment pits and sediment run-off entering the waterway. It was alleged that the Council's concerns were not resolved when raised. Both JTL and Mr Speedy were charged.

[5] As a result of a flyover of Carver Forest in February 2019 and the subsequent execution of a search warrant, the Council developed concerns over the volume of spoil and sediment at this site, some of which was said to be underneath the surface of the water, the minimal sediment and erosion controls, and the lack of stabilisation methods. An abatement notice was served in March and two site inspections were conducted in March and June. Charges were then brought against JTL and Mr Turkington alleging offences relating to discharging contaminants, the conducting of impermissible forestry earthworks, and the failure to comply with an abatement notice.

[6] The charges in relation to Jack's and Carver Forests were brought in the District Court at Whanganui.

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2 *John Turkington Ltd v Manawatū-Whanganui Regional Council* [2024] NZDC 12781 [costs decision].

[7] The Findlay Forest harvesting took place between October 2019 and March 2020. A number of similar contraventions of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (the Regulations) were alleged.[3] JTL and Mr Speedy were charged. These charges were addressed in separate proceedings in Palmerston North.

[8] The Crown assumed responsibility for the Carver and Jack's Forests prosecutions in early 2020. On 8 May 2020 it amended the charges against JTL but withdrew the charges that had been personally brought against Mr Turkington. Mr Turkington disputed the Crown's ability to withdraw the charges in this way, and he sought a dismissal under s 147 in order to obtain a deemed acquittal. The Crown did not oppose that application, which was granted by Judge Hassan on 22 June 2021.[4]

[9] The charges against Mr Speedy concerned his alleged personal involvement in the activities in Jack's Forest, including because he was identified as the "harvest manager" in the formal Harvest Plan. This document was ruled to be inadmissible documentary hearsay against Mr Speedy by Judge Hassan, and the relevant charges against Mr Speedy were dismissed under s 147 on 22 June 2021.[5] The Crown continued its prosecution against Mr Speedy in relation to the activities to Findlay Forest, however. But following a hearing in April 2022, Judge Kirkpatrick granted Mr Speedy's application under s 147 on essentially the same basis as the earlier decision concerning Jack's Forest.[6]

[10] The charges against JTL in Whanganui continued in relation to Jack's and Carver Forests. JTL applied for a discharge of three of the four charges under s 147 at the conclusion of the Crown's case. That application was refused by Judge Kirkpatrick on 25 January 2023.[7] Those charges, as amended, and the charge that was not subject to this application proceeded, with the jury acquitting JTL of all charges.

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3 The Regulations were subsequently amended by the Resource Management (Environmental Standards for Commercial Forestry) Amendment Regulations 2023.
4 *R v Turkington* [2021] NZDC 12307.
5 *R v John Turkington Ltd* [2021] NZDC 12306.
6 *R v John Turkington Ltd* [2022] NZDC 18302.
7 *R v John Turkington Ltd* [2023] NZDC 1376.

[11] The Findlay Forest trial took place the following year in Palmerston North. Two charges were advanced. At the end of the Crown's case JTL applied to have one of the charges be discharged pursuant to s 147, and this application was granted.[8] This is the decision which is subject to the Crown's application for leave to appeal. The remaining charge was also later dismissed.

[12] Following the dismissals and acquittals, JTL, Mr Turkington and Mr Speedy made applications for costs under the Costs in Criminal Cases Act.[9] By judgment dated 7 June 2024 the applications were declined in relation to JTL and Mr Turkington, but granted in a reduced amount for Mr Speedy, essentially in relation to the period of time when Mr Speedy was prosecuted after his first successful s 147 application in relation to Jack's Forest and the successful s 147 application in relation to Findlay Forest.

The Crown's appeal

[13] We deal first with the Crown's appeal from Judge Kirkpatrick's decision under s 147 dismissing the charges against JTL concerning activities in Findlay Forest. The Crown seeks leave to appeal pursuant to s 296 of the Criminal Procedure Act. The Court has directed that the application for leave should be addressed together with the substantive appeal.

[14] A key feature of the harvesting in Findlay Forest is that the trees had been planted on steep slopes right down to the edge of a stream. The stream is a tributary of the Manawatū River. It was apparent that when the harvesting activities took place machinery was operated in the streambed itself. Indeed, it appears from photographs available to us that it may not have been possible to harvest the trees without doing so. The Crown's case was that this activity infringed the requirements of the Regulations. In granting the s 147 application, Judge Kirkpatrick identified the relevant requirements for such harvesting operations, including the requirement in r 68(5) of the Regulations that any disturbance to a waterbody from such machinery be

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8 Dismissal decision, above n 1.

9 There is a further application in relation to another individual which has not been determined which is not part of these appeals.

"minimised". He then held that the Crown had presented inadequate evidence directed to the minimisation question. The Judge held:[10]

> [17] There is clear evidence presented by the witnesses called by the Crown of significant disturbance of the tributary of the Manawatū [river] in block 6 of the Findlay farm and along its margins. But there is no measure presented in the evidence to show that the extent, however significant, has not been minimised or was unnecessary or was inessential.
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> …
>
> [24] I accept the submission of counsel for the defendant that a jury should not be called on to speculate as to what the law requires. The framing of reg 68(4) and (5) requires judgments to be made on questions of degree. In the absence of evidence providing the jury with a scale against which the questions of degree may be determined, I find that proof of the charge cannot be established beyond a reasonable doubt. For those reasons the application is granted and charge 2 is dismissed.

[15] In doing so the Court recorded that prosecution evidence had been given by an expert ecologist, and others with some experience in the forestry industry, but that the Crown had called no evidence from a forestry harvesting expert to support the case that the disturbance to the waterway had not been minimised.[11]

Arguments

[16] On appeal, Mr Lillico for the Crown advances two arguments. First, he argues that there has been a misinterpretation of the Resource Management Act 1991 and the Regulations. Operating harvesting machinery within the waterway itself is absolutely prohibited in the absence of a resource consent. It is unnecessary for the Crown to prove that JTL minimised the disturbance to the waterway in accordance with r 68. Secondly he argues that the evidence that the Crown had called was sufficient for the question of minimisation to be assessed by the jury.

[17] For JTL Mr Pilditch KC argues that it is an abuse of process for the Crown to now contend that the activities in the waterbody were absolutely prohibited given the way the prosecutions have been presented. He also argues that r 68 did set the relevant requirements in relation to the harvesting activity, including its requirement for disturbance to be minimised, and that the District Court had rightly dismissed the

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10 Dismissal decision, above n 1.
11 At [18]–[22].

charges because the Crown had called no evidence relevant to the minimisation question.

Relevant provisions

[18] Section 13 of the Resource Management Act provides:

> **13 Restriction on certain uses of beds of lakes and rivers**
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> (1) No person may, in relation to the bed of any lake or river,—
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> …
>
> (b) excavate, drill, tunnel, or otherwise disturb the bed; or
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> …
>
> unless expressly allowed by a national environmental standard, 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.
>
> (2) No person may do an activity described in subsection (2A) in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (2A) The activities are—
>
> (a) to enter onto or pass across the bed of a lake or river:
>
> …

[19] A "national environmental standard" is defined in s 2 to mean the standards prescribed by the Regulations, and the term "river" is defined in a way that includes a stream of the kind involved in the present case.

[20] Regulation 97 of the Regulations relevantly provides:[12]

Discharges, disturbances, and diversions

97 Permitted activity: regional council

(1) Any discharge of sediment into water or to land in circumstances that may result in it entering water, disturbance of the bed or vegetation in the bed of a river or lake, or diversion of water associated with a plantation forestry activity is a permitted activity if subclauses (3) and (4) are complied with and—

(a) pruning and thinning to waste complies with regulations 19(2) and 20:

(b) earthworks comply with regulations 24 to 33:

(c) river crossings comply with regulations 37 to 46:

(d) forestry quarrying complies with regulations 51(2), 52, 54(3) and (4), 55, 56, 58, and 59:

(e) harvesting complies with regulations 63(2) and (3), 64, and 65 to 69:

(f) mechanical land preparation complies with regulations 73(2) and 74:

(g) slash traps comply with regulations 83(2) and 84 to 91.

…

Permitted activity conditions: fish spawning

(3) Disturbance of the bed or vegetation in the bed of a perennial river or lake must not occur unless subclause (4)(a) or (b) applies.

(4) Disturbance of the bed or vegetation in the bed of a perennial river or lake may occur if—

(a) the electronic tool referred to in item 9 of Schedule 2 (*Fish Spawning Indicator*) indicates—

(i) no presence of a fish species listed in Group A or Group B in the Fish Spawning Indicator in the segment of the river or lake marked in the Fish Spawning Indicator where the bed or vegetation in the bed would be disturbed; or

(ii) the presence of a fish species listed in Group A or Group B in the Fish Spawning Indicator in the segment of the river or lake marked in the Fish

[12] The following are cited from the version of the Regulations before amendment in 2023. There are only minor differences in terminology between the two versions.

Spawning Indicator where the bed or vegetation in the bed would be disturbed, but disturbance is not during the relevant fish spawning period; or

(b) for the segment of the river or lake marked in the Fish Spawning Indicator where the bed or vegetation in the bed would be disturbed, a suitably competent person has—

(i) confirmed that the species observed do not spawn in the river or lake habitat where the disturbance will occur; or

(ii) in the case of a river, undertaken a freshwater fish survey in accordance with the document referred to in item 10 of Schedule 2 (*New Zealand Freshwater Fish Sampling Protocols*) and has observed no presence of any of the species listed in Group A or Group B in the Fish Spawning Indicator; or

(iii) in the case of a lake, undertaken a freshwater fish survey in accordance with the techniques in item 13 of Schedule 2 (*Introduction to monitoring freshwater fish*) and has observed no presence of any of the species listed in Group A or Group B of the Fish Spawning Indicator.

…

(6) In this regulation,—

disturbance of the bed or vegetation in the bed of a perennial river does not include—

(a) vehicles using a ford to cross the wetted river bed at a rate of up to 20 axle movements per day:

(b) hauling logs over the bed of a river less than 3 m wide where butt suspension is achieved in the segment of the river marked in the Fish Spawning Indicator, in the relevant spawning period shown in the fish spawning indicator, unless any species listed in Group B in the Fish Spawning Indicator is present:

(c) clearing a slash trap

…

[21] Regulation 68 then provides:

68 Permitted activity conditions: disturbance of margins of water bodies and coastal marine area

(1) Trees must be felled away from any water body or riparian zone during harvesting, except where it is unsafe to do so, to

minimise disturbance to the margins of water bodies and to the coastal marine area.

(2) If the exception in subclause (1) applies, trees must be felled directly across the water body for full-length extraction before de-limbing or heading.

…

(4) Harvesting machinery must not be operated, except where subclause (5) applies,—

(a) within 5 m of—

(i) a perennial river with a bankfull channel width less than 3 m; or

(ii) a wetland larger than 0.25 ha; or

(b) within 10 m of—

(i) a perennial river with a bankfull channel width of 3 m or more; or

(ii) a lake larger than 0.25 ha; or

(iii) an outstanding freshwater body; or

(iv) a water body subject to a water conservation order; or

(c) within 30 m of the coastal marine area.

(5) Harvesting machinery may be operated in the setbacks required by subclause (4) only if—

(a) any disturbance to the water body from the machinery is minimised; and

(b) the harvest machinery is being operated—

(i) at water body crossing points; or

(ii) where slash removal is necessary; or

(iii) where essential for directional felling in a chosen direction or extraction of trees from within the setbacks in subclause (4).

…

Abuse of process

[22] We do not accept Mr Pilditch's argument that the appeal is an abuse of process, and that leave to appeal should not be given as a consequence. We accept that the prosecutions have proceeded on the basis that r 68 applies. But if on its true interpretation it does not apply, and the operation of harvesting machinery within a stream is absolutely prohibited in the absence of a resource consent, then it is important that this be clarified by this Court, and that the charge that has been dismissed be allowed to proceed on the correct interpretation of the requirements. This would not involve any unfair prejudice to JTL, and falls well short of the kind of abuse described by this Court in *Fox v Attorney-General*.[13] For these reasons we consider that leave to appeal should be granted to allow the argument to be addressed on its merits.

Is streambed disturbance prohibited?

[23] We do not accept the Crown's argument that the legislation completely prohibits operating harvest machinery in the beds of rivers and streams in the absence of a resource consent.

[24] Section 13 of the Resource Management Act prohibits the disturbance of a riverbed unless as allowed by other provisions, including the Regulations. Harvesting itself is a permitted activity under r 63. Regulation 97(1) then expressly allows the "disturbance of the bed … of a river" if the other specified requirements of the Regulations are met. This includes those specified for harvesting in r 97(1)(e), which includes those in r 68. There is no absolute prohibition on operating harvesting machinery which disturbs the bed of a river or stream in the Regulations. Rather, the framework is that this activity is permitted, provided that the regulatory requirements for doing so are satisfied.

[25] Those requirements do not directly contemplate operating harvesting machinery within the banks of a river or stream in the way that apparently occurred in the present case. The Regulations contemplate disturbance of the beds of rivers and streams, but only in other more peripheral ways. Regulation 97(6) allows vehicles to

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

cross a wetted riverbed at a rate of 20 axle movements per day, and the hauling of logs over the bed of a river less than three metres wide in certain circumstances. But it does not appear to have been expressly contemplated that harvest machinery would be operated within the beds of rivers and streams in other circumstances. The Regulations appear to contemplate that the trees would be located outside the beds of rivers and streams, and the Regulations then closely regulate how to harvest the trees when they are near to such waterways. There is no prescribed definition of "harvesting machinery", and these words would contemplate a range of machinery including both vehicles used in harvesting and hand-held machines, such as chainsaws.

[26] But these features of the Regulations do not mean that there is a lacuna requiring the Court to consider adopting a different interpretation which would allow the purpose of the Regulations to be better achieved. Here it is plain that vehicles used in harvesting have operated extensively in the bed of the stream. Indeed it is apparent from the photographs available to us that the channel of the stream has been altered in places so that it now flows down the tracks made by the vehicles. But this is in circumstances where the trees were originally planted near to the edge of the stream. Regulatory requirements now prevent trees being planted in these areas.[14] But we consider that these circumstances also mean that it is highly likely that harvesting machinery has been operated within the five metre "setbacks" on each side of the stream in the manner contemplated by r 68(4). That would not only have been so in relation to the trees that were planted within the setbacks, but also for trees that were located beyond the setbacks, as harvesting machinery would likely have been operated to bring the trees across the setbacks to the vehicles in the streambed. So it seems to us that, from a practical point of view, it is likely that the operation of harvest machinery within the streambed has also unavoidably involved operation of harvest machinery within the setbacks. Certainly such a conclusion would be open to be reached by a jury.

[27] It would follow that the requirements in r 68 would apply to the harvesting activities that took place. A central question under r 68 would then be whether operating the vehicles within the streambed itself was consistent with the obligation

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[14] Resource Management (National Environmental Standards for Commercial Forestry) Regulations, r 14(3).

in r 68(5) that the "disturbance to the water body from the machinery is minimised". It was part of the defence that this activity was unavoidable for the safe harvesting of trees that had been planted close to the edge of the stream. Other requirements in r 68, including the directional felling requirements in r 68(2) and (5)(b)(iii), may also have been relevant. The key point is that we do not accept the Crown's argument that the operation of harvesting vehicles within a streambed itself is unregulated. The provisions involve a form of effective regulation from a practical point of view.

[28] In any event, even if the above analysis does not provide a practical answer to the Crown's argument and there is a significant gap in the Regulations, we do not think it possible to interpret the plain meaning of the words of r 97 in any alternative way. The words are clear on their face, as is the overall scheme of the Regulations. They allow the disturbance of the streambed provided that the specified requirements are complied with. If the requirements, and principally those in r 68, do not limit the activity in question, then the activity is permitted, even if this would appear to be inconsistent with the overall purpose of the Regulations.

[29] For these reasons we do not accept the Crown's first argument. We agree with the District Court that the requirements of r 68, including the requirement for disturbance to be minimised, were correctly identified as the basis for the prosecution in the s 147 decision.

Evidential basis for the charge

[30] Mr Lillico's alternative argument is that, even if the District Court's interpretation was correct the Judge erred in accepting the defence submission that there was no foundation in the evidence for the charges. The prosecution evidence showed that vehicles had been driven along the entire length of the stream. The Crown's evidence, including from Mr Logan Brown, a senior scientist at the Council, was sufficient to show an arguable case that the disturbance to the streambed had not been minimised by such activity.

[31] We do not accept the Crown's argument. As Judge Kirkpatrick emphasised, the ultimate question for the jury was whether JTL had minimised the disturbance to the bed of the stream from a forest harvesting perspective. This turned on forestry

harvesting standards and techniques. The trees to be harvested had been planted down to the edge of the stream, and the terrain was steep in places. But the Council had called no evidence from a forestry harvesting expert to say how the trees should have been harvested in a way that minimised the impact on the stream. The evidence from Mr Brown, for example, was not expert evidence concerning forestry harvesting. Mr Brown had a Bachelor of Science majoring in Ecology and a Masters of Science in Ecology from Massey University, and had worked in his career as a scientist. He did not have expertise in forestry harvesting, and did not purport to give expert evidence about forestry harvesting. Similar points can be made about the other witnesses that had been called by the Crown.

[32] As the Judge emphasised, the questions involved matters of fact and degree, and in the absence of some basis upon which the jury could make the required assessment, the charges could not be established beyond reasonable doubt. It follows that we agree with the Judge's decision.

[33] For these reasons the Crown's appeal is dismissed.

The costs appeals

[34] Following the dismissal of all of the charges as a consequence of the decisions under s 147 and the jury verdicts, JTL, Mr Turkington and Mr Speedy each sought costs against the Council and the Crown under the Costs in Criminal Cases Act. These applications were dismissed by Judge Kirkpatrick with the exception of an award of $15,000 in Mr Speedy's favour.[15] All three now appeal from that decision.

[35] The Costs in Criminal Cases Act relevantly provides:

> **5 Costs of successful defendant**
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> (1) Where any defendant is acquitted of an offence or where the charge is dismissed or withdrawn, whether upon the merits or otherwise, the court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.

[15] Costs decision, above n 2, at [119]–[121].

(2) Without limiting or affecting the court's discretion under subsection (1), it is hereby declared that the court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—

(a) whether the prosecution acted in good faith in bringing and continuing the proceedings:

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:

(d) whether generally the investigation into the offence was conducted in a reasonable and proper manner:

(e) whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point:

(f) whether the charge was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.

(3) There shall be no presumption for or against the granting of costs in any case.

(4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or that any charge has been dismissed or withdrawn.

(5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

[36] The principles relevant to the award of costs were summarised by this Court in *R v Lyttle* in the following terms:[16]

(a) While success in the proceeding is a jurisdictional prerequisite to an application, the fact of success is neutral when the discretion whether or not to award costs is exercised.

(b) The court has a broad discretion when determining whether or not to make an award under the [Costs in Criminal Cases Act].

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16 *R v Lyttle* [2022] NZCA 52, [2022] NZAR 117 at [18], citing *Banks v R* [2016] NZHC 1596 at [41].

(c) The seven matters set out in s 5(2), or those that are relevant, are to be considered. The factors set out in s 5(2) are also qualified by the words "[w]ithout limiting … the court's discretion", so regard should be had to all relevant circumstances, and not simply those set out in s 5(2). There is a danger in narrowing relevant considerations by reference to s 5(2) or in trying to fit particular circumstances into one of the factors listed in s 5(2).

(d) The matters set out in s 5(2)(a) to (e) refer in a general way to the propriety, conduct and strength of the prosecution case. Affirmative answers might tend to inhibit or weigh against an award of costs or diminish the quantum of the same.

(e) The terms "proper steps" and "in a reasonable and proper manner" in s 5(2)(c) and (d) mean something less than would be adopted by a reasonably prudent prosecutorial authority. It is a difficult burden to surmount.

(f) The fact that a prima facie case is established at a preliminary hearing, or that a judge refuses a discharge, is likely to support the conclusion that there was sufficient evidence at the commencement of the proceeding.

(g) The matters set out in s 5(2)(g) are concerned with behaviour justifying an award, and not with behaviour disqualifying an award.

(h) Costs are not to be awarded only because the defendant has been acquitted. An applicant must be able to point to some relevant circumstances, either within the criteria, or otherwise, that justify an award.

[37] The Costs in Criminal Cases Regulations 1987 specify the maximum scale of costs payable, although the Court is able to award higher costs if this is desirable.[17] It is recognised that the scale is out of date so awards above the scale have become more common.[18]

District Court decision

[38] Judge Kirkpatrick found that there was no bad faith or fault on the part of the prosecution in bringing or pursuing the charges. He concluded that both the legislative framework and the facts of the case were complex, and there were consequent difficulties in drawing clear boundaries between permitted and unpermitted activities of the kind covered by the prosecution.[19] He said:

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17 Costs in Criminal Cases Act, s 13(3).
18 *R v Lyttle*, above n 16, at [19]; and *R v Bublitz* [2018] NZHC 373 at [59].
19 Costs decision, above n 2, at [107]–[108].

> [109] … [A] defendant may reasonably say that a prosecutor should assess such complexity in terms of the [Solicitor-General's] Prosecution Guidelines rather than, effectively, by laying charges and waiting to see what happens: it cannot be a defendant's burden to try and sort out the complications of the regulations and it is the prosecutor's burden to meet the evidential and public interest tests for prosecution. There is obvious force in those submissions, but it would be wrong in law to say that therefore a prosecution ought not to be undertaken merely because there may be a risk that the factfinder, whether jury or judge, will assess the sufficiency of the evidence differently.

[39] In relation to JTL, the Judge assessed the principles and the features of the case and concluded an award of costs was not justified or appropriate.[20] He then went on to consider whether, notwithstanding that conclusion, an award should be made because of the duration and scale of the proceedings. He found, however, that he did not have sufficient information from JTL in order to assess what a reasonable sum would be on that basis and so made no such award.[21]

[40] In relation to Mr Turkington Judge Kirkpatrick concluded that the investigation was not conducted in an unreasonable or improper manner, there was no bad faith involved in bringing the charges, that the prosecutor did not have insufficient evidence to support a conviction at the commencement of the proceedings, and that no costs order should be made.[22]

[41] In relation to Mr Speedy he noted that prosecutions under the Resource Management Act were routinely brought against natural persons as well as bodies corporate, and that there was no evidence of bad faith. Whilst the outcome of the applications for dismissal showed that the case faced difficulties from an evidential perspective, he concluded that this did not demonstrate there was insufficient evidence available at the time of laying the charges, and for that reason he found that there was no reason to award costs against the Council. He considered, however, that an award of costs against the Crown in relation to the subsequent application for dismissal was justified because the Crown continued to prosecute Mr Speedy notwithstanding the evidential difficulties which had been revealed by the first s 147 decision.[23] He concluded that, in a broad discretionary assessment of what was just and reasonable,

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20 At [112].
21 At [113]–[118].
22 At [71]–[72].
23 At [87] and [92]–[93].

it was appropriate to award $5,000 in relation to the prosecution of the Jack's Forest charges and $10,000 in relation to the prosecution of the Findlay Forest charges.[24]

Arguments

[42] For JTL Mr Pilditch relied upon the Solicitor-General's Prosecution Guidelines 2013 and various authorities concerning the evidential sufficiency for prosecutions, and argued that the District Court had made an error in principle by concluding that there was a sufficient basis to commence and continue with the prosecution. He argued that the evidential sufficiency limb required more than evidence capable of resulting in conviction. Rather the prosecution needed to establish a reasonable prospect of that conviction. The complexities of the regime informed the evidence that was required before a prosecution could be justified, and it was the prosecutor's burden to meet the evidential and public interest tests for prosecution. He argued that an award of costs was amply justified. Bad faith or fault was not a prerequisite for an award. Moreover, the Court had erred in relation to the evidence that had been provided in relation to quantum. Whilst the narrations from the invoices had been redacted, the Court had all of the relevant bills before it.

[43] For Mr Turkington, he argued that the conclusion that the prosecutor had sufficient evidence at the time of commencement of the prosecution was unsustainable given the dismissal of charges under s 147 by Judge Hassan. There had never been a proper basis to bring the charges. The Judge had also erred in relation to the suggested lack of information about the costs incurred by Mr Turkington.

[44] Finally, in relation to Mr Speedy, Mr Pilditch said the fact that all the charges against him had been dismissed under s 147 showed that there never had been a proper foundation for the charges. It should always have been recognised that the evidence was inadequate. It was also irrelevant that there was a practice of charging individuals as well as corporate entities. The Court had also erred in relation to the inadequacy of the evidence about quantum.

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[24] At [95].

[45] Ms McConachy for the Council and Ms Johnston for the Crown argued that the costs decisions were correctly made for the reasons given.

Assessment

[46] An appeal against a decision considering the award of costs under the Costs in Criminal Cases Act involves an appeal against the exercise of a discretion.[25] To succeed, the appellant would need to show that the District Court acted contrary to law or principle, took into account irrelevant considerations, failed to take into account mandatory relevant considerations or made a decision that was plainly wrong.[26]

[47] We are not persuaded the District Court made any such errors in the present case.

[48] We do not accept Mr Pilditch's submissions directed to the evidential sufficiency requirements for bringing or continuing with a prosecution. We do not consider that substantial assistance is derived from analysing authorities on the meaning of the "reasonable prospect of conviction" threshold referred to in the Solicitor-General's Guidelines, the guidelines in other jurisdictions, or decisions from overseas addressing the standards in their jurisdictions.[27] Nor do we consider it necessary or appropriate to reach a conclusion on the "test" that must be satisfied for bringing or continuing with a prosecution in accordance with the Solicitor-General's Guidelines in the context of this costs appeal.[28] Whilst the Solicitor-General's Guidelines guide the conduct of prosecutions, and are relevantly considered when addressing claims for costs, they do not provide any particular test to be applied under the Costs in Criminal Cases Act. Evidential sufficiency is just one of the considerations referred to in s 5(2)(b) in the context of a broad discretion.[29]

[49] Here the strength and quality of the prosecution case was taken into account by Judge Kirkpatrick. When he did so he assessed what we agree was a central consideration — whether defendants should be subject to prosecution when there is

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25 *R v Reid* [2007] NZSC 90, [2008] 1 NZLR 575 at [23].
26 *R v Lyttle*, above n 16, at [80], citing *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
27 See, for example, *R (Gujra) v Crown Prosecutions Services* [2012] UKSC 52, [2013] 1 AC 484.
28 See *Hohua v R* [2021] NZCA 551 at [23].
29 See *R v Lyttle*, above n 16, at [18].

both legal and factual complexity that may mean that there is a risk that the prosecution may ultimately be unsuccessful. As he found, it would be contrary to the public interest for prosecutions not to be brought simply because of such uncertainties.[30] In the case of JTL, one of the charges was not subject to a s 147 application, and others proceeded before a jury. Whilst this Court has explained that unsuccessful s 147 applications would not be determinative, the fact that the applications were largely not successful supports the view that there was a proper basis to bring the prosecutions against the company.[31]

[50] This was a case where there were reasonable concerns arising from adverse environmental effects caused by forest harvesting activities. They had been identified by investigations that included a flyover and the execution of search warrants. Relevant witnesses were approached.[32] Experts in environmental impacts were then used by the Council and the information gathered in the investigations were subject to independent oversight. Whilst the Council had other enforcement options, prosecution nevertheless remained a reasonable approach. When the prosecution was taken over by the Crown, a decision was made to discontinue the prosecution against Mr Turkington personally, but the charges continued against the company and Mr Speedy personally given a basis to allege that he was the manager in charge of the harvesting activities.

[51] Given that background, it was open to the Judge to conclude that the prosecution was not commenced or continued in bad faith, or unreasonably. When there is no bad faith or unreasonable conduct, it is less likely that a costs award will be appropriate.[33] Whilst costs award could still be made, there would need to be reasons to do so. And we accept that the Judge gave proper consideration to that potential.

[52] This included the Judge going on to consider whether costs should be awarded because of the scale and complexity of the proceedings. We accept that the Judge

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30 Costs decision, above n 2, at [109].

31 *R v Lyttle,* above n 16, at [18(f)].

32 We do not accept that there was an investigation failure in Mr Cashmore not being interviewed given that he was approached and he declined to be interviewed given his rights. Both Mr Turkington and Mr Speedy also declined to be interviewed.

33 *Blackwood v R* [2020] NZCA 504 at [9].

erred when doing so by saying that he only had examples of the invoices evidencing the legal costs. It is apparent that he had all the relevant invoices, albeit that the relevant narrations were redacted so that it was not apparent what services were provided for the fees involved. We also see some force in the argument that the redactions did not prevent the Court making an assessment of a contribution to those costs. But we nevertheless accept that the Judge's ability to fully assess such an award was constrained: he did not have a comprehensive description of the legal work that had been undertaken for the expenditure involved because of the lack of narrations or other evidence providing this detail. The lack of fuller explanations was not an irrelevant consideration, and we are not persuaded to interfere with the Judge's ultimate conclusion for this reason.

[53] In relation to Mr Turkington's personal claim, we do not accept that there is a material inconsistency between the Court's decision granting the s 147 application, and the conclusion of Judge Kirkpatrick that there was sufficient evidence to support a conviction at the commencement of the proceedings in accordance with s 5(2)(b). The Crown made a decision not to oppose the s 147 application. It had attempted to withdraw the charges, which by then could not be re-brought as they were time-barred, but it was ultimately accepted that this approach was not available. This did not mean that Judge Kirkpatrick was bound to accept that there was insufficient basis to bring the charges in the first place given the requirements for personal liability under s 338 of the Resource Management Act. We consider that it was open to him to assess the evidence to reach the conclusion that he did. Charges against JTL proceeded to the jury, and Mr Turkington was the sole director and owner, and the apparent controlling mind of the company. Whilst the Crown's evidence was ultimately assessed as insufficient to support the continuation of the prosecution against him, we see no error in principle in the District Court approach.

[54] In relation to Mr Speedy we also accept the Judge reached a conclusion that was open to him. In common with the Judge, we accept that there was a proper evidential basis to conclude that Mr Speedy was personally involved with the activities that were said to involve contraventions. He was identified in Harvest Plan as the harvest manager, and there was other evidence to support that conclusion. If there was contravening conduct through the company's activities, there was accordingly a basis

to allege that he was involved in it in accordance with s 338 of the Resource Management Act. We do not consider that the Judge's observation that prosecutions are routinely brought against natural persons as well as companies was doing any more than reflecting these realities. Ultimately the Harvest Plan was ruled inadmissible as documentary hearsay, and the s 147 applications were granted in relation to Jack's Forest and then subsequently in relation to Findlay Forest. Again, dismissal of the charges is simply one of the factors that are relevant under s 5 on the approach outlined in *R v Lyttle*. The decision of the Judge to grant Mr Speedy a partial award, particularly because the Crown should not have continued with a prosecution after the first successful s 147 application, was an appropriate and balanced one.

[55] For these reasons we consider that the Judge made no error of law or principle, that he took into account relevant considerations, did not take into account irrelevant considerations, and reached conclusions that were reasonably open to him. We consider that the appeals against the costs awards should be dismissed.

Result

[56] The Crown's application for leave to appeal in CA515/2024 is granted.

[57] The appeal in CA515/2024 is dismissed.

[58] The appeals in CA440/2024 are dismissed.

Solicitors:
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