

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRN: 5004502435
5003402436**

AUCKLAND CITY COUNCIL
Informant

v

**B & C SHAW LTD AND
GEORGE BERNARD SHAW**
Defendants

Hearing: 2 March 2006

Appearances: Mr B Dickey & Ms M Nacey for the Informant
Mr P Wicks for the Defendants

Judgment: 2 March 2006

NOTES OF JUDGE FWM McELREA ON SENTENCING

The Facts

[1] There are two defendants in this case, Mr Shaw and his company B & C Shaw Ltd. The company owns the land in question, a residential property at 21 Mt Smart Road, Royal Oak, Auckland. Mr Shaw is sole director of and a shareholder in the company.

[2] The land was bought by the company as a development site for town houses.

[3] A significant feature of that site was a large Pohutukawa tree, well known in the area and notable for its visual and amenity values. It was older than any resident, had a crown spread of 14 metres and stood about 10 metres high.

[4] On 24 January 2005 that tree was felled by workmen engaged by the defendants. The defendants' intention was to make the site easier to develop and thereby increase the profit to be made.

[5] This action was an offence because no resource consent had been obtained from Auckland City Council.

[6] Consent was needed for two separate reasons – because the tree was over a certain size, and because it was listed as a protected item in the Council's Schedule of Notable Trees.

[7] The defendants knew of the need for consent, as there was an unresolved application for resource consent to build within the drip line of the tree. Mr Shaw also knew because he had previously been convicted on charges of a similar type relating to two different properties in Auckland City in 1997. Clearly, consent to fell the tree was unlikely to have been granted even if it had been sought, and equally clearly the defendants knew this.

Tree protection a community affair

[8] Although it is the RMA that creates the offence of breaching a rule of a district plan, I stress that it is the elected local body, in this case the City Council, that makes the rules to protect the local environment, and it does so through a process of rigorous public consultation, objection and debate. The district plan is therefore both a form of local law and an expression of democracy at a district level. It represents the consensus of inhabitants of the district on matters of concern to them. It is Parliament that has given district plans the force of law, but the content of the law is a local matter.

[9] That content is prescriptive but not inflexible. Few activities are banned outright. Many activities are permitted subject to resource consent being obtained. The resource consent process is itself a form of participatory democracy, with rights of objection, cross objection and hearing built in to it. Criticisms of the RMA as imposing unnecessary “compliance costs” on business tend to overlook that those are the costs of meeting the community’s expectations of people doing business in their district.

[10] It may be significant that the present charges were able to be laid because concerned citizens who saw the men with chainsaws noted the registration number of their vehicle and gave that to the Council. Although Mr Shaw denied being involved, and publicly claimed to be the victim rather than the perpetrator, search warrants were obtained from the Environment Court which enabled first the owner of the vehicle to be traced and secondly phone calls between the contractors and Mr Shaw to be identified. I commend the citizens who took the first step of noting the number of the vehicle. It is the watchfulness of the public that ultimately solved this case.

The process of public apology

[11] Before the defendants appeared before a Judge, but after these charges were laid, the defendants embarked on a course of public apology. I was advised in Court on 15 December 2005 that Mr Shaw had already met and expressed his apology to a Council compliance monitoring officer, and separately to the Council’s Planning and Regulatory Committee (on 8 December), and proposed to attend a public meeting of the Maungakiekie Community Board early in 2006. He had also provided a written apology to the Council, which was going to be published, and had made a voluntary payment of \$50,000 costs on 2 December. (I return to the costs later).

[12] The defendant of course is entitled to credit for this very fulsome and public acceptance of responsibility, but I mention it here to highlight the fact that a public process, which counsel were referring to as “restorative justice”, was embarked upon at the defendant’s initiative and not at the suggestion of the Court. What the Court

did was to ensure that from then on the restorative justice process was managed by an experienced restorative justice facilitator.

[13] As it happens, the public form of restorative justice process that was used, although unprecedented in New Zealand to my knowledge, seems to have been worthwhile and meaningful to all concerned. It was also consistent with the strong interest of local residents in the matter, and with the democratic nature of the creation of district plans.

Restorative justice process

[14] The facilitator of this process was Deborah Clapshaw, who has qualifications both in law and in mediation. She facilitated a meeting held on 25 January at the Onehunga Community Centre, in public and in the glare of the cameras. It was criticised by a *NZ Herald* editorial as being some form of medieval ordeal, but that account was not accepted by the facilitator or by two others present whose accounts I have read. They confirm that the tone of the meeting was reasonable, that good order was kept, and that several speakers although upset spoke calmly and avoided exaggeration. The meeting was reminded of the need to respect Mr Shaw's dignity. Most significantly, Mr Shaw's own Counsel Mr Wicks supports the facilitator's view of the meeting. I accept his advice to the Court on the point.

[15] In summary, the public meeting allowed many affected people to express their views about the value of the tree to them, and the effects of this offending upon them. That had value for those who were upset at what had happened, for the defendant, who could experience first-hand the effects of his conduct on others, and ultimately for the public in terms of shaping a proposal to "put right the wrong" for the benefit of the community.

[16] It is worth noting the mixture of people who attended that first meeting. There were Community Board members; local residents and former residents; City Councillors and some Council staff; representatives of The Tree Council, the Onehunga Club, the Mt Eden North Residents Association and other community

organisations; and of course Mr Shaw and his wife, his counsel, his real estate agent, and others who spoke in his support.

[17] Views expressed were obviously varied, but seem to be encapsulated in the concern of one Community Board member for the flagrant breaking of rules for personal gain, indicating that it was insulting to people who give time to the community that others should show no respect for the rules. Different speakers stressed the visual pleasure derived from the tree over generations, especially at Christmas, the importance of the rule of law for community life, the need to protect venerable old trees, and a concern that Mr Shaw should not profit from his actions.

[18] After a tea break, Mr Shaw apologised to the community and the Community Board for the destruction of the tree. He offered no excuses and said he was deeply remorseful. He totally accepted all the criticisms made at the meeting, and he wanted to try and restore the position and make things right. He was willing to plant a replacement tree and care for it, as well as to pay for tree planting in other places and indeed to take part in the tree planting. He said that the offence had occurred because of financial stress and a desire to sell the property, but he did not offer this as an excuse. He said that he had now given up property development.

The follow-up meeting and agreed outcome

[19] Ms Clapshaw convened another meeting on 21 February at the same venue. This was a smaller group who attended by invitation of the facilitator, and included Council and Community Board representatives, a Tree Council member, and seven or eight nearby residents who had attended the first meeting. The purpose of the meeting was to discuss possible outcomes. The meeting accepted an arborist's advice that the existing tree will not survive. The outcome agreed by the meeting was essentially a proposal made by Mr Shaw, which mirrored a proposal of the Community Board but was reworked during the meeting. It has the following five components:

- Mr Shaw is to meet the cost of transplanting an existing large specimen native Pohutukawa tree (as large as is viable), to be sourced by the Council. This is to

be planted in a position where it is fully visible from Mt Smart Rd, 7m from the road frontage and central on the site. The visibility of the tree will continue to be protected under this preferred option.

- In order to ensure the long term protection of the new tree and site, Mr Shaw will consent to an enforcement order under the RMA which would bind any future owner of the site, requiring that within [meaning “for”?] the next five years BS shall meet the cost of an arborist maintaining the replacement tree, and that no work can be carried out within the existing drip line of 14m (i.e. a radius of 7m) but measured around the new tree on the site. In addition the enforcement order is to provide that if the replacement tree should die within the five-year protection period, it will be replaced.
- BS will by 1 May 2006 make a donation of \$20,000 to the Community Board specifically for the purchase of at least 200 trees to be planted (at the earliest opportunity, but no later than the end of the planting season) at sites chosen by the Board, with the help of Council Parks staff and arborists. The Community Board will arrange volunteer planting days, supervised by the Council officer in charge of these plantings, and at which BS will attend during the duration of planting to assist the volunteers in this task.
- BS’s contribution of \$50,000 towards the Council’s costs was noted, and no proposal was made for further costs. It was agreed that the fine should be at the discretion of the Judge.
- It was proposed that the remains of the felled tree be available for community preservation.

Comment on the restorative justice outcome

[20] The Court is required to take the outcome of the restorative justice process into account in sentencing – see s 8(j) of the Sentencing Act 2002. I return to this topic shortly.

[21] The first component of this outcome is a valuable form of reparation to the environment that can be ordered in environment cases but not in ordinary District Court sentencing.

[22] The proposed enforcement order will have two benefits that are highly relevant to this case. First, it will ensure that neither the defendants nor a future owner of the site will benefit from this offending. Secondly the replacement tree will be planted on a more visible part of the property, i.e. closer to Mt Smart Road, and central to the site, so that in time it may prove to be a bigger asset than the felled tree.

[23] The third component of the outcome is a creative form of community work specifically tailored to the crime. In addition it involves a financial cost (\$20,000) which along with the cost of transplanting and maintaining the tree would have a similar impact to a fine – especially in RMA cases where 90 percent of fines goes to the local body anyway.

[24] As to the fourth part, whether a fine is to be imposed (as the outcome envisages), or imprisonment, is of course for the Court to decide - and is the most difficult issue for decision. It is of course possible to fine the company and imprison Mr Shaw, but those two sentences cannot be imposed on Mr Shaw.

[25] Finally, it is appropriate that the remains of the felled tree be put to some community use.

[26] Looking at the agreed outcome as a whole, it represents an impressive package of proposals that are aimed at putting right the wrong done by the defendants, so far as that is possible, to the satisfaction of those most affected, and committing Mr Shaw to be part of a community building exercise in which the “poacher turned gamekeeper” works alongside volunteers to plant trees in other places.

[27] I wish to record the Court’s thanks to all those involved in this consultative process and its appreciation of the time and careful thought that has been put in to

providing some very helpful suggestions to the Court. I expect that the restorative justice process will also have had benefits for the participants, as research has repeatedly shown. I also wish to record the Court's appreciation of the quality of Ms Clapshaw's two reports to the Court.

Sentencing submissions

[28] These canvas in a helpful way the requirements of sentencing law in RMA cases. They are to be found in the decision of the full Court of the High Court in *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 492, the relevant provisions of the Sentencing Act 2002, and the integration of these two sources by the High Court in *Selwyn Mews Ltd v Auckland City Council* (High Court, Auckland, CRI-2003-404-159, 30 April 2004, Randerson J). Counsel have also referred to other cases involving trees, which I have considered as well. The relevant principles and factors I now address under several headings.

Nature of the environment affected

[29] This was an urban environment where trees are an important part of the environment. The tree was listed as a Notable Tree. Mr Wicks accepts that this tree was valuable for its visual amenity and its historical significance to the community. He pointed out however that the tree could have been built around so that it was not readily visible to the public.

[30] It is worth noting the submission made and accepted concerning the several types of amenity provided by trees in *North Shore City Council v Keli* (Auckland District Court, CRN 04004502284, 7 June 1005, McElrea DCJ):

There is visual amenity, privacy, habitat for birds and other wildlife, a noise buffer to a certain extent, weather shield, stabilising of land, and atmospheric effects in terms of absorbing carbon dioxide from the atmosphere and giving off oxygen. Trees also help control temperatures and clean the air of traffic pollution and they provide a sense of heritage and continuity. All of this shows that cutting down trees is serious business. (at para 20)

[31] The fact that this was a native tree is irrelevant to the charge. The relevant fact is that it was a protected tree listed in the Council's Schedule of Notable Trees. Some such trees are natives and others are not.

The extent of the damage inflicted.

[32] The damage was total. The tree cannot survive, despite early attempts by the Council to revive it.

The deliberateness of the offence

[33] Mr Shaw accepts that the offending was deliberate and inexcusable. His previous convictions and the existence of an unresolved application for resource consent to work within the drip line of the tree make that concession inevitable. Mr Dickey notes that the offence was premeditated with a commercial motive. Also, "the offending was carried out in a cynical fashion and it took considerable council resources to determine who the offenders were."

The attitude of the defendant

[34] From a starting position of defiance and denial, the defendant now expresses deep regret and remorse. That can be an easy thing to say through counsel, and in view of the completely opposite view being held before he was "found out", the Court and others are entitled to be sceptical about the claim to feel remorse. Is it simply remorse brought on by the prospect of serious punishment? Are these just "crocodile's tears"?

[35] I cannot fathom Mr Shaw's inner mind, but I have to accept that he has expressed very fulsome and public apologies in several different venues. He has behaved as one who wants to make amends in more than a token manner, and he has listened to the grievances of many people, fronting up to them personally and not seeking to hide behind counsel or excuse his conduct. It is quite possible that in this process he has undergone a change of heart – which is not at all uncommon in

restorative justice processes. So I give him some credit for remorse, but not the same as if he had felt it at the time, or soon thereafter.

[36] The defendants are also entitled to credit for their *Guilty pleas*, entered on 15 December 2005. Such credit is given for the fact that the informant is saved the costs and uncertainties of a defended hearing, and is commonly of the order of one-quarter, or one-third where accompanied by genuine remorse. However, as the Guilty pleas were entered in the light of significant information obtained by search warrant, one may also say that it was a case of bowing to the inevitable, and there was not much uncertainty about the outcome.

Previous convictions

[37] There are some minor criminal convictions in the distant past but only a trespass charge recorded in recent years (2003). I express my concern that the District Court has so much trouble in obtaining lists of previous convictions when dealing with matters prosecuted by local bodies, and the fact that this list, now obtained, does not show his convictions in 1987 under the RMA. On 8 December in that year Judge Bollard convicted Mr Shaw on four charges, three relating to the destruction of trees on two properties in Auckland City in 1996, in *Auckland City Council v Shaw* (Auckland District Court, CRN 6004056373, 8 December 1997, Bollard DCJ). He was fined \$4,000 and \$750 costs in respect of each tree – at a time when the level of fines was considerably lower than it is today – and warned that if he offended again “the Court will not treat such matters at all lightly” (at page 6).

[38] While that was not a warning that re-offending might result in imprisonment, and in 1997 no sentence of imprisonment had been imposed under the RMA, by the time this tree was cut down a sentence of imprisonment had been imposed after trial in *R v Borrett* [2004] NZRMA 248 for repeat offending in bush clearance and earthworks, and by a different Judge on late Guilty pleas in *R v Conway* [2005] NZRMA 274 for repeated environmental offending of a different nature. Both cases had received publicity, and Mr Shaw should then have been recalling the warning of Judge Bollard in a new context.

[39] In addition to these convictions, but as a piece of relevant prior offending, Mr Dickey draws attention to the fact that in 1993 Mr Shaw admitted to the unconsented removal of generally protected trees from a property in Epsom. He was required by the Council to carry out extensive remedial work.

The financial position of the defendants

[40] Statements of means have been filed that show that the defendants are of substantial means. The company has net assets of \$7.3m less tax of \$3.45 = \$3.95m. Mr Shaw has net assets of \$1.2m and a surplus of income over outgoings of \$11,600 p.a. His assets include 1000 shares in the company, the remaining 69,000 shares being held by the Shaw Family Trust.

[41] Under s 40(2) of the Sentencing Act 2002 the court imposing a fine has to take a defendant's financial position into account whether this has the effect of increasing or decreasing the amount of any fine. The object is that a fine should be both fair and meaningful to the particular defendant.

Personal factors

[42] Mr Wicks mentions that Mr Shaw and his company have over the years paid to the Council over \$500,000 in reserve contributions, on top of resource consent fees. However this does not show any generosity on the part of the defendants as these contributions are required by law to help pay for the demand for services created by new development. To the contrary the relevance of that amount is that it shows that Mr Shaw is a very experienced property developer indeed, who full well knew his legal obligations.

[43] On the other hand, I accept that Mr Shaw has been a good employer of many staff over the years, and that he has been generous with many tradesmen and other people he has helped in the ways explained in a testimonial provided to the restorative justice facilitator by four named people. They describe him as a good and genuine man, with strong family values and willing to help people starting out or in

need of a mentor. I would hope that any mentoring he provides in future will include the lessons he has learned from this episode.

Sentencing Act purposes

[44] Sentencing must take into account the purposes set out in s 7 of the Act, or such of them as are relevant in the particular case.

Holding the offender accountable for harm done

[45] A very recent paper by a visiting American scholar from Northeastern University School of Law in Massachusetts, *Restorative Justice Jurisprudence in New Zealand (1998-2005)* by Yael Shy, draws together cases of both the High Court and the District Courts, showing how the courts have taken restorative justice into account in deciding sentence. Ms Shy suggests that sentencing goals such as accountability, responsibility, deterrence and denunciation may be accomplished *through*, rather than balanced *against*, the restorative process. In other words, a restorative justice process is not just another mitigating factor. I believe this is amply demonstrated by the cases mentioned in Ms Shy's paper. It is of course a matter of degree, and a defendant may be held accountable in different ways.

[46] The present case illustrates a defendant who was prepared to be accountable in an unusually public way, to various representatives of public bodies and voluntary societies, as well as to the immediate neighbours likely to have been most personally affected. He has been held accountable through this process, as a preliminary to the court process, in a way that does not occur when counsel speaks for a defendant in court. That does not mean that he is not also accountable through the Court, but in large measure this purpose has already been accomplished.

Promoting in the offender a sense of responsibility for, and an acknowledgement of, that harm

[47] Mr Shaw has taken full responsibility for, and readily acknowledged the harm that he has done to the environment and to the community by his offending.

He has expressed this by word and action in tangible ways. This purpose also has been achieved in large measure.

Providing for the interests of victims of the offence

[48] The victims, broadly understood, are all those people who experienced loss as a result of this conduct. They include particularly neighbours, but also the wider community who valued this beautiful tree.

[49] Such people are likely to benefit not only from the outcomes of the conference, but also from the process itself. Most studies of restorative justice show the real value experienced by victims in being able to express their feelings directly to the offender, ask questions of him or her, obtain assurances for the future, participate in the shaping of a possible outcome to the matter, and by confronting all these issues personified in the offence and offender at hand, to begin to put the matter behind them. Indeed, several studies show that such needs of victims can be met through restorative processes in a way that traditional court proceedings can rarely match. I assume that to have been the case here. One participant wrote, “I was glad to take part in this democratic exercise and hope that it will be repeated.” (OD Keymer of Royal Oak, letter to the editor of *NZ Herald*, 30 June 2006.)

Providing for reparation for harm done by the offending

[50] As already explained, a proposal has come from the restorative justice process that makes reparation in an unusually fulsome way. It is thoughtful and detailed. It has the support of the defendants and of the various representatives of the community present at the second meeting. It therefore has a strong chance of working as intended.

Denouncing the conduct of the offender

[51] This has been done to some extent by the process followed so far, and Mr Shaw has accepted that denunciation as justified – not a common feature of offenders. Of course the Court also denounces that conduct. I say to Mr Shaw now

that this was totally unacceptable, especially in view of the knowledge you had of the local rules, and the previous offences of a similar type. It was serious offending carried out by stealth for purely financial motives. Denunciation also is to be measured by the sentence imposed, as is considered below.

Deterrence of the offender and/or others from similar offending

[52] The Courts have stressed the importance of this factor in environmental offending. Especially for someone with prior convictions, the need to ensure there is no re-offending is strong. But apart from individual deterrence, there is a need to deter others that might be tempted to try the same tricks.

[53] I have to ask myself how far deterrence, both individual and general, has already been achieved. Mr Wicks makes the pertinent submission that “the very public nature of the restorative steps undertaken, ... combined with the strong commentary and opinions expressed by media regarding Mr Shaw’s actions, are such that there is very real deterrence to others arising out of the stigma and justified criticism associated with such a public airing.”

[54] There has to be much merit in that submission. The public has already received the message that anyone behaving like this is in big trouble. Mr Shaw’s decision to face up to this matter publicly may have served to heighten public awareness of the existence of tree protection rules, the likelihood of being caught if there are observant citizens around, and the seriousness with which the matter is regarded - not only by the Court but also by local bodies and community organisations. There is indeed an educative role for sentencing in RMA cases, as the High Court noted in *Machinery Movers* at p 504, but this has already been seen in this case.

Protection of the community from the offender

[55] The defendant is not the sort of dangerous offender that this purpose is directed at, and the community will be protected from him if he has learned his lesson from this offence.

Assistance with the offender's rehabilitation and reintegration

[56] While it might be thought that this purpose has no relevance in RMA cases, I suggest otherwise. The terms “rehabilitation and reintegration” of course apply to the hardened criminals who undergo anger management or drug abuse programmes, but they can also apply to a persistent offender of other types.

[57] Sentencing by way of fines and imprisonment do not of themselves promote such objects, but other aspects of sentencing can advance these ends. This can be done by supervision or community work orders, for example. Here however they may be part of the outcome already proposed by the restorative justice process.

[58] The “reforming” of such a person, to use an old-fashioned term, is still an important objective. It suggests that they are unlikely to re-offend, not just because they calculate that they might get caught and punished (deterrence), but because they no longer think it is acceptable or “right”. Being “re-integrated” can apply to anyone who by their conduct or other circumstances has become cut off from their society. They can redeem themselves and be restored to a place of respect.

[59] This is a strong plank of restorative justice, the need for respect on all sides – to show respect, and to promote respect, in this case respect for the environment, for neighbours, and for the rules of the community, and ultimately for Mr Shaw. I expect that Mr Shaw will have earned some respect already from those who attended the restorative justice meetings. If he were to carry out the whole of the programme he has agreed to, he would build for himself yet more respect, in proportion to the respect he demonstrates for others in this way. The trees he pays for and plants, will be one measure of this growing respect for the environment, and for him. From being the offender he can become part of the solution. It is in his hands.

[60] Section 7 concludes by stating that the purposes of sentencing a particular offender may be any two or more of the above, and that these purposes are not necessarily to be given weight according to their sequence in the section. It is up to the sentencing Judge to determine their weight in the circumstances of the individual case.

The principles of sentencing as set out in s 8 of the Sentencing Act

The gravity of the offending in the particular case, including the degree of culpability of the offender.

[61] I assess the culpability of Mr Shaw as being very high, and the gravity of the offending as being reasonably high.

The seriousness of the type of offence in comparison with others, as measured by the maximum penalties

[62] The maximum penalties are a fine of \$200,000 or a term of two years imprisonment. These are therefore reasonably serious offences, and within the scope of RMA offences they would in my view fall towards the upper middle of the range.

The general desirability of consistency with other cases

[63] I have considered the cases put before me, and I am aware of many others. Most RMA offenders are dealt with by way of fines. In two cases mentioned, repeat offending has resulted in imprisonment. Neither of those cases however involved subsequent steps of the type Mr Shaw has undertaken.

[64] Consistency cannot be judged only by one or two characteristics of the offending. Facts relating to the offender and the victim are often relevant. Even without a restorative process, the Courts will frequently take into account when considering consistency, events subsequent to the actual offending – for example, the effects on the victim, steps taken to make an apology or the undo the damage, or voluntary action by a defendant to make re-offending less likely (selling a car, enrolling in a preventative course).

[65] I conclude that factors of consistency do not steer me in one direction or another.

The effect of the offending on the victim

[66] This was best demonstrated through the restorative justice process, but there was also a victim impact statement filed by a council compliance officer.

The least restrictive outcome that is appropriate in the circumstances

[67] As noted by Randerson J in the *Selwyn Mews* case, this provision means that fines will usually be the appropriate sentence in RMA cases. But of course that is only one principle amongst many to be balanced in this case. There is also s 16 of the Sentencing Act, which Mr Wicks stressed, which requires that imprisonment is not imposed unless the usual purposes of sentencing cannot be achieved in other ways. It states the desirability of keeping offenders in the community where the safety of the community is not at risk.

The outcome of any restorative justice process that has occurred

[68] This has been extensively canvassed.

Aggravating and mitigating factors – s 9 of the Act

[69] The only factors from s 9 that are relevant are, on the one hand, the extent of the damage caused, the high level of premeditation, and the previous convictions of Mr Shaw, and on the other hand the plea of Guilty, the expression of remorse, and some evidence of good character.

The payment made of \$50,000 for costs

[70] The agreement to make this payment was reached between Mr Shaw and the Council before the restorative justice meeting had occurred. Mr Dickey has confirmed that most of those costs (around \$40,000 worth) related to separate proceedings in the Environmental Court, not this Court, where the Council sought and obtained interim orders to protect the remains of the tree and the site. The defendants initially opposed those orders.

[71] I decline to give the defendants credit for that \$40,000 in this sentencing. Those costs were incurred by the Council in a separate exercise, and were made unnecessarily high by the need to apply for search warrants to establish the identity of the offenders. They would not have been necessary if Mr Shaw had co-operated from the outset, instead of publicly claiming to be the victim. They have no relevance in this prosecution as a mitigating factor to the defendants' credit.

[72] But nor do I treat Mr Shaw's initial denial as being itself an aggravating factor. Rather, like a Not Guilty plea that is later changed to one of Guilty, it is the absence of a mitigating factor, namely early remorse and co-operation with the authorities, which if present would have counted in his favour.

[73] (In a similar vein, I note that that the company has incurred very large holding costs on the capital tied up in this investment while this matter has been underway – quantified today by Mr Wicks at \$240,000. But that is a commercial reality rather than a factor for which the defendants claim credit at sentencing.)

[74] I do give credit for the remaining \$10,000 paid in costs, and for the costs of the restorative justice meetings that have been met by the defendants.

The real sentencing choice in this case

[75] As with any case where a restorative justice outcome is before the Court, I take it as my starting point, and ask if there is any reason why it should not be accepted. After all, it has the advantage of being an outcome that those most directly affected feel would meet their needs and address the wrong done. But of course where charges are laid in court, it is for the Court to decide sentence, and it must do so according to legal principle and using all the material before it. The restorative justice process is part but not all of that material.

[76] In this case the two reports from the conferences have been extremely helpful in shaping part of a sentence. I will adopt the proposed enforcement order that will provide a new tree, protect it for five years, and effectively prevent a profit from being made from this offending. I support the notion of a donation of \$20,000

towards Council-supervised tree planting, using volunteers. It is an admirable exercise in community building that demonstrates that good can come out of bad. It would be even better, but is not essential, if Mr Shaw took part in that tree planting. It would be a form of community work and should help in his rehabilitation as a citizen worthy of respect. I accept, as did the conference, that any fine is a matter for the Court, and clearly there should be a fine for the company.

[77] The most difficult question is whether there should also be a fine for Mr Shaw, or whether he should receive a term of imprisonment. By law he cannot receive both. Mr Dickey seeks a substantial fine, and this is not opposed by Mr Wicks. The informant is therefore not seeking a term of imprisonment, and nor did those at the conference seem to feel that imprisonment is necessary. While I take that into account the Court must make its own decision on that point. It has to represent a wider public interest, and to impose a sentence on behalf of society as a whole.

[78] I am very clear about one thing. The previous offences and the seriousness of this offending would, on their own, call for a term of imprisonment on this repeat offender, in the same order as two other recidivist offenders have received – three months. That would have served to punish, deter and denounce this sort of offending. Prison was the starting point for Mr Shaw.

[79] But the hard question is whether that is now appropriate in view of all else that has happened, and on an overall view of the many sentencing factors I must take in to account. It is the total sentence that must be fair and just.

[80] I must also recognise that prison is not the only way to punish, deter, or denounce a crime. The courts now have a variety of ways of achieving these purposes, and there are also the newly stated purposes of accountability, responsibility and the interests of victims. I have already shown how all those purposes can be seen as partly (or in some cases substantially) achieved already, and that must be reflected in the sentence imposed today.

[81] Finally, it can no longer be assumed that prison is the greatest punishment, or the best deterrent, or the most effective way of denouncing a particular offence. In many cases it may be, but not always - and it is a matter of judgement to decide when.

Conclusion

[82] I have concluded that in this case a sentence of imprisonment is not required to punish, deter or denounce. For all the foregoing reasons those objectives and others, I believe, can be achieved through another form of sentence which builds on the restorative justice process which has occurred, which meets the community's needs as expressed through that process, but which will incorporate a heavy fine.

[83] In terms of the amount of the fine I have to look at the total financial position. I have already said that I put aside the \$40,000 or so that has been paid for separate proceedings, but I do take into account the remaining \$10,000 that has been paid. I am also told that the total costs incurred by the Council came to over \$100,000 and approximately \$57,000 is still outstanding. The Council will receive, as a matter of law, 90 percent of any fines imposed and will be reimbursed for its expenses in their totality if a substantial fine is imposed. If I had been imposing a term of imprisonment I would have ordered costs as a separate matter.

[84] The sentence, which I now fix, is a combination of these things. First of all there will be an enforcement order in the terms proposed, which will provide for a replacement tree to be put there, indeed in a more prominent position than the old one, at the expense of the defendants and to be maintained by them for a period of five years. That order will be binding on any future owner of the property for that period, so that its effects cannot be escaped by the sale of the property.

[85] I accept also the proposal from the conference that there be a form of community work and donation to the local community through the Community Board. That is the figure of \$20,000 recommended for the planting of 200 trees. I commend the idea of Mr Shaw taking part in the planting of those trees, as a form of community work and as part of his rehabilitation.

[86] I stress that the sentence that I have come to is not an exercise in leniency. It is a tough sentence because the fine that will be imposed is substantial. That fine is going to be in two parts. First of all I now impose a fine on Mr Shaw of \$80,000. I do so having regard to his very substantial means as a property developer, and it must be a fine that reflects the seriousness of this case. There will also be a fine on the company of \$25,000 if the voluntary donation is not paid and the community work is not done. I am going to defer sentencing the company for some months to allow that work to be carried out.

[87] If the work is carried out then the company will be convicted and discharged, but will be subject to the enforcement order now to be made. If the work is not done - that is, the payment to the Council for the purchase of trees and Mr Shaw's participation in the tree planting as envisaged - then there will be a fine of \$25,000 imposed on the company. In that way the Court can monitor the outcome of this restorative justice process and ensure that the objectives of all concerned have been achieved.

[88] Finally I direct that 90 percent of all fines are payable to the Informant under s 342 of the Act. I ask that counsel confer immediately to draw up an enforcement order for my signature and for sealing pursuant to the sentencing remarks I have now made.

FWM McElrea
DISTRICT COURT JUDGE