PAUL v HOUSING CORP. (Crimes) Copy 2

Set 3

M NO 31/83

IN THE HIGH COURT OF NEW ZEALAND

BLENHEIM REGISTRY

BETWEEN DAVID GEORGE PAUL of 84 Scott Street, Blenheim, Teacher

Appellant

AND THE HOUSING CORPORATION OF NEW ZEALAND

Respondent

Hearing: 4 September 1984

Counsel: A D MacKenzie for Appellant
J.R.F. Fardell for Respondent

Judgment: 25 September 1984

JUDGMENT OF JEFFRIES J

This is an appeal by David George Paul (hereafter called appellant) against two convictions and sentence entered in the District Court at Blenheim on 18 November 1983. The convictions arose out of charges laid by the Housing Corporation of New Zealand pursuant to s 18(1)(e) of the Economic Stabilisation Act 1948 in that it was alleged appellant committed offences against the Rent Freeze Regulations 1983 (S.R. 1983/98). In the lower court he faced charges with Philip Angus Taylor (hereafter referred to as Taylor).

The facts are a little unusual and I will now attempt to set out the relevant ones. The appellant and Taylor were co-owners in a two flat property situated at 38A and 38B Stephenson Street, Blenheim. The exact legal nature of the co-ownership was not able to be established by the evidence except that Taylor was the dominant owner in the sense of having a greater share. As at 22 June 1982 the tenant for 38B was Miss Thompson paying $40 per week and for 38A was Miss Bee paying $35 per week. Apparently the property outside was poorly maintained and the owners were wishing to sell. Notices to quit were given to the tenants and they left. The fact that notices to quit were given was the subject of two informations against each of the defendants in the lower court dealt with in the judgment. It is convenient to mention here a multiplicity of informations were laid against each defendant (12) and all but 4 against each were dismissed by the Judge. When the Judge proceeded in the course of his oral decision to an analysis of the evidence there were against each defendant 2 charges of stipulating, demanding or accepting rent in excess of that previously accepted and 2 of giving a notice to quit with the intent to determine the tenancy for the purposes of contravening the restrictions contained in the Regulations.

New tenants were obtained and a Mr. Sixtus went into 38B at a total rent of $50 per week later divided between $40 for the flat and $10 for an outside shed to house his motorcycle. A Miss Schroder went in flat 38A it seems at $35 per week although there was an early

misunderstanding (at best) for she paid $50 per week until her tenancy agreement made it clear she was only required to pay $35. The Judge, on this point, made findings against Taylor.

As stated both appellant and Taylor faced numerous charges under the Regulations arising out of the aforesaid facts but most charges against both defendants in the lower court were dismissed. Appellant was finally convicted on 2 counts, one relating to each flat in that contrary to Regulation 4 and Regulation 13 of the Rent Freeze Regulations 1983 for himself or for himself and Philip Angus Taylor stipulated for, demanded or accepted on account of a property situated at 38A (other information 38B) Stephenson Street, Blenheim, rent in excess of that payable for the said property as at the 22nd day of June 1982. The two Regulations state as follows:-

> "4. <u>Rents frozen as at 22 June 1982</u>
>
> (1) Notwithstanding anything in any other enactment or in any lease or agreement, where any property or dwellinghouse was let on the 22nd day of June 1982, the rent payable in respect of that property or dwellinghouse in respect of the period beginning with the 14th day of June 1983 and ending with the close of the 29th day of February 1984 shall not exceed the rent payable in respect thereof as on the 22nd day of June 1982.

(2) Subclause (1) of this regulation applies whether or not the tenant occupying the property or dwellinghouse during the period beginning with the 14th day of June 1983 and ending with the close of the 29th day of February 1984 is the same as the tenant occupying the property or dwellinghouse on the 22nd day of June 1982.

13. Offence in respect of money that is irrecoverable

Every person commits an offence against these regulations who, for himself or for any other person, stipulates for, or demands or accepts, on account of any property or dwellinghouse, any sum of money which, by virtue of these regulations, is irrecoverable."

There can be no doubt the District Court Judge who heard this case faced a daunting task, all aspects of which need not be detailed here. However something must be said. The hearing took place over three different days, namely 9, 10 and 18 November 1983. Because of the exigencies of sitting at a court where there is no resident judge he was faced with giving an oral decision starting after 6 p.m. on 18 November having heard evidence and submissions that day besides having to recall evidence taken in the previous week. It is therefore entirely understandable that some issues of fact and law were not sharply focussed upon in the course of that decision. The

matters of fact to be set out represent the findings by the learned Judge or seem reasonable inferences from remarks made by him in the course of that judgment. However before embarking upon that task, and so as to make the findings relevant to the decision, I set out first the grounds of appeal advanced in this court:-

"1. THAT on the facts as found by the Judge, the Appellant did not personally either 'stipulate for demand or accept' any sum of money which was made irrecoverable by the provisions of the Rent Freeze Regulations 1983.

2. THAT the Appellant did not therefore on the evidence provided and facts found established by the Judge commit the actus reus of the offence which he was held to have committed.

3. THAT the Judge was wrong to classify Regulation 13 of the Rent Freeze Regulations 1983 as constituting an offence of absolute liability in relation to which no mens rea needed to be established by the prosecution.

4. THAT the Appellant did not have, on the evidence provided and facts found established by the Judge the requisite mens rea to establish the offence appealed against.

5. THAT the provisions of Section 18(2) of the Economic Stabilisation Act 1948 should not have been relied on by the respondent as the form of

the informations filed against the Appellant was not such that the provisions of Section 18(2) could be relied upon by the prosecution.

6. THAT the Court was wrong to hold that the provisions of Section 18(2) applied on the facts established. The relationship between the Appellant and the Co-Defendant in the original proceedings could not be characterised as that of servant or agent in the course of his employment, and master or principal."

On the evidence and judgment I find the following facts established. There was no personal involvement by appellant with either of the tenants Sixtus or Schroder. Appellant said in evidence he had had no dealings with either and one of them he had never seen. Taylor had all the dealings with them. Appellant had no personal knowledge of the notices to quit and never exercised any control over receipt of rent. Certainly his knowledge of the increase in rent was at least not proved. Statements of the bank were not sent to him. The Judge in his decision relied on the word "stipulated" to justify convictions and there was no evidence to support a finding appellant had ever stipulated or demanded for excess rent. The mere evidence rent was paid into a joint account fell short of acceptance. Moreover the Judge declined to rule on acceptance. Rent was used for outgoings by Taylor, who managed the property.

Perhaps it might be as well to deal with ground 3 first. For myself I think a regulation which uses such

words as "stipulates for, or demands or accepts", means that the offence requires proof of mens rea. The two words "stipulates" and "demands" are quite strong, positive words which carry with them intent, knowledge or recklessness as ingredients to be proved by the prosecution. In any event if I am wrong in that then the offence is what has become known as a public welfare offence, being one in which the doing of the prohibited act prima facie imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This means the burden of proof rests upon the defendant which he is able to discharge on the balance of probabilities. See Civil Aviation Department v MacKenzie [1983] NZLR 78. I hold this was not an absolute offence as the language used in the Regulations seems to exclude that. It must be mentioned the Judge himself entertained the possibility they were not absolute offences but his categorisation progressed no further. In summary this court categorises the regulation as one requiring the prosecution to prove mens rea as for a truly criminal offence. In the alternative if it be a regulatory offence of the McKenzie type then I would hold there is sufficient evidence for appellant to have discharged the burden resting on him.

I think the above findings on fact and law greatly assist in deciding this particular case. The first point in the appeal is decided in favour of the appellant. The position of Taylor might be different, but he has not appealed. It follows the second and fourth points must also be decided in appellant's favour.

I turn to points 5 and 6. That leaves the true interpretation to be placed on s 18(2) of the Economic Stabilisation Act 1948 which states as follows:-

> "Any offence against this Act committed by a servant or agent in the course of his employment shall be deemed to have been also committed by his employer or principal unless the employer or principal proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence".

This subsection raises something like a McKenzie type defence in statutory form. On the evidence there is no question of an employer employee relationship. At all times apparently appellant has been employed as a school teacher and he agreed to purchase the flats with Taylor on what is probably most accurately called a joint venture. It was an investment for them both although Taylor had the greater share. I did not see or hear witnesses but one gathered Taylor was perhaps the more experienced in business dealings and gravitated to the role of manager of the enterprise. The Judge at several places in the course of his decision referred to Paul as Taylor's partner. In another part of the decision when referring to Taylor he said in parenthesis "(I'll call him the principal here)" but I do not take this as a definite finding in law. However in the sentence in which he convicted appellant he refers to Taylor as his partner. I cannot find hard evidence to support a finding Taylor acted as appellant's agent. Even if this hurdle were overcome I think the

Judge in his findings seemed to indicate the defence might have been made out although in other findings he seemed to think not. The conviction could not stand on this basis. Mr Fardell for the Crown accepted s 18(2) did not apply but argued for vicarious liability on other grounds. Despite Mr Fardell's carefully prepared argument on the alternative aspect of vicarious liability the convictions would not be sustained on that ground. No special relationship existed between Paul and Taylor and the legislation does not impose vicarious liability.

The appeal succeeds and the 2 convictions are quashed. In the circumstances I think the appellant is entitled to an order for costs amounting to $250.

Solicitors for Appellant: Rudd Watts & Stone

Solicitors for Respondent: Crown Solicitor, Wellington

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