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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1714/83

BETWEEN TETARUKE TIMBER COMPANY LTD

Appellant

A N D RODNEY COUNTY COUNCIL

Respondent



Counsel: Bryers for Appellant
Katz for Respondent

Judgement: 10 May 1984

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JUDGMENT OF PRICHARD, J.

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On 20 October 1983 the Appellant was convicted in the North Shore District Court of the offence of using land at East Coast Road, Redvale, in a manner not in conformity with the district scheme of the Rodney County Council. The offence charged is that created by s.92 of the Town and Country Planning Act, 1977. The charge was the commission of a continuing offence on 20 December 1982 and divers dates since then. The land in question is zoned "Rural A". The Appellant uses the land to carry on a sawmilling operation which, it is alleged, is a commercial or industrial use not permitted in a Rural A zone.

The Council's district scheme provides for a variety of predominant uses in Rural A zones, those possibly relevant

being items (a) and (k):-

> "(a) Farming of any kind, forestry, fishing, including rock oyster and other mollusc cultivation, and racing stables."
>
> "(k) Buildings or uses accessory to the foregoing provided that buildings of a commercial or industrial nature ancillary to farming forestry or fishing are not a predominant use."

The Appellant company's operations on the land comprise bringing on to the property raw logs purchased from outside sources and there milling the logs into sawn timber (using a portable saw-mill), stacking the sawn timber and offering it for sale.

In the Court below, the Appellant advanced the following arguments, all of which were rejected by the learned District Court Judge:-

(a) That, as a lessee of Crown land, the Appellant is immune from prosecution under the Town and Country Planning Act.

(b) That the Appellant's use of the land can properly be regarded as forestry or accessory to forestry and is therefore a predominant use.

(c) That the company has existing use rights.

(d) That the company had a reasonable and honest

belief, encouraged by the Informant, that it was entitled to use the land for timber milling and therefore (throughout the period covered by the charge) had no mens rea.

In this Court, the Appellant relied only on grounds (a) and (b).

The factual situation is that the land in question was formerly leased from the Crown by a person who used it for storing fence posts and battens. On 26 May 1982, the Appellant company entered into a tenancy agreement with the Crown whereby the Appellant agreed to take the land as tenant for a term of one year less one day, commencing on 11 May 1982, at a rental of $100 per month with a right of renewal on the same terms for a further period of one year less one day. The tenancy agreement included the following provisions:-

> (6) "The property shall be used solely for TEMPORARY SAW MILLING OPERATIONS and for no other purpose whatsoever and no temporary nor permanent living accommodation whatsoever shall be placed thereon.
>
> (7) The tenant shall comply with all statutory or local body regulations and requirements relating to the tenant's use of the land."

On 25 August 1982, the Appellant forwarded to the Council an application seeking the Council's consent to the use of the land for a "temporary sawmilling operation". On 27 August 1982 the Council sent by registered mail a notice calling on the Appellant company to cease its use of the land for sawmilling purposes.

The Appellant's application for planning consent was declined by the Council. The company appealed to the Planning Tribunal. I was informed from the Bar that the appeal was heard on 4 November 1983 and that a reserved decision was delivered on 9 February 1984 (the day before the hearing of this appeal). The appeal was successful to the extent that the company was permittted a specified departure from the district scheme for a period of two years.

The present appeal therefore becomes of academic interest rather than practical importance, although Mr Bryers informed the Court that the Appellant can see enough timber available in the district to warrant carrying on its business for ten years - if it can obtain an extension of the term of its tenancy agreement.

In support of his submission that the Appellant has the benefit of the Crown's immunity from prosecution under the Town under Country Planning Act, Mr Bryers argues that as the Crown has the right to use Crown land for any purpose it likes, untrammeled by the provisions of the Town and Country Planning Act, it follows that the Crown can permit its lessees to use such land for any purpose whatsoever. To hold otherwise, Mr Bryers submitted, would be an interference with the Crown's rights. Mr Bryers relied on two judgments of this Court, both to the effect that contractors engaged by the Crown to carry out work on

Crown land are exempt from statutory provisions which would be applicable if the same work were carried out on private property:

(a) Lower Hutt City v. Attorney-General (1965) N.Z.L.R. 65. This was a judgment of the Court of Appeal to the effect that the Drainage and Plumbing Regulations cannot be enforced against drainlayers and plumbers engaged by the Ministry of Works to carry out work on Crown Land.

(b) Wellington City Council v. Victoria University (1975) 3 N.Z.L.R. 301.

Cooke, J. applying Lower Hutt City v. Attorney General (supra) and Doyle v. Edwards (1898) 16 N.Z.L.R. 572, held that a building permit was not required for the erection of a university building on Crown Land and that the Council could not impose a height restriction under the Town and Country Planning Act, 1953 because such a restriction would affect the rights of the Crown which, (in the absence of an express provision to the contrary in the Town and Country Planning Act, 1953), are protected by s.5(k) of the Acts Interpretation Act, 1924.

Section 5(k) of the Acts Interpretation Act, 1924 reads:-

> "No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound

> thereby; nor, if such Act is of the nature of a private Act, shall it affect the rights of any person or of any body politic or corporate except only as is therein expressly mentioned:"

There is no provision in the Town and Country Planning Act 1977 which expressly provides that the Crown is bound by the Act except s.17(1) which reads:-

> "The Crown and every local authority and public authority shall adhere to the provisions of an approved regional planning scheme".

This does not require the Crown to "adhere" to the provision of a district scheme and, accordingly, as was observed by the Court of Appeal in Stewart v. Grey County Council (1978) 2 N.Z.L.R. 577,585, the Crown (with certain exceptions not material for present purposes) is not subject to the Town and Country Planning Act.

Mr Katz, for the Respondent Council, submits that Lower Hutt City v. Attorney-General and Wellington City Council v. Victoria University are distinguishable on the ground that they were cases where work was done on land over which the Crown retained full control. Such a distinction, he contended, was made by Wilson, J. in Victory Park Board v. Christchurch City (1965) N.Z.L.R. 741. The question in Victory Park Board v. Christchurch City Council was whether the Council was entitled to levy rates on Lancaster Park. The Park is administered by the Victory Park Board, constituted under the Victory Park Act, 1919: the land is vested in the Crown, but merely as

a bare trustee having no beneficial interest in it and no functions with reference to it. The decision turned on the interpretation of s.412 of the Municipal Corporations Act, 1954, which as follows:

> "(1) Except as otherwise specifically provided herein, nothing in this Act or in any regulations or bylaws under this Act shall be construed to apply to or shall in any way affect the interest of Her Majesty in any property of any kind belonging to or vested in Her Majesty.
>
> (2) Except as provided in subsection one of this section, this Act and the regulations and bylaws thereunder shall apply to the interest of any lessee, licensee, or other person claiming an interest in any property of the Crown in the same manner as they apply to private property."

Wilson, J. held that the land did not "belong" to the Crown because that expression connotes beneficial ownership. It followed that where the interest of the Crown is less than full beneficial occupation and ownership of the land, the interest of another person who occupies it under a lease or licence or has any other form of claim to it, is to be treated separately from that of the Crown and so, in terms of s.412(2) subject to the Act and Regulations. Wilson, J. had no difficulty in distinguishing Doyle v. Edwards (supra) on the ground that when that case was decided under the Municipal Corporations Act, 1886, the Act contained a provision identical with s.412(1) of the Act of 1954 but did not contain anything equivalent to s.412(2). In Doyle v. Edwards, Prendergast, C.J. said at p.746:-

> "I think it is plain what construction must be given to the words of s.3 of the Municipal Corporations Act 1886. It is plain there is a property in the land and building vested in the Crown. It is true, also, that there is a property in the lessee; but, inasmuch as serious liabilities would be imposed on the Crown if its land, though under lease, were subject to all building bylaws, and to the various provisions of the Municipal Corporations Act relating to nuisances, etc., I think s.3 does exempt land belonging to and veseted in the Crown, although a leasehold interest is created, and that it cannot be said that this builder was liable to get a permit. To hold so would be to affect the land. There are no words excluding tenants from the benefit of the exemption, and such words cannot be presumed."

I find no direct assistance in the cases which turn on the interpretation of the provisions of the Municipal Corporations Act. The question before me is whether, in terms of s.5(k) of the Acts Interpretation Act 1924 the "rights of the Crown will be affected" if the Town Planning Legislation is held to be applicable to the use of land by Crown tenants.

There are possibly two ways of looking at this question. From a commercial point of view, if tenants of the Crown are bound to comply with the restrictions as to user contained in the Town Planning Act, then this must limit the field of prospective lessees of Crown land and thus the "rights" of the Crown are affected. On the other hand, because the legislation is directed to the use of land rather than to its ownership, it can be said that the statutory restrictions on the use of land apply

specifically to the person who physically occupies and makes use of the land, irrespective of the source from which the occupier's estate or interest is derived. The legal right vested in the Crown is the right to create leases, licences and similar tenures of Crown land in favour of individual occupiers. That right is not restricted or affected if the Town Planning Act applies to the activities of the individuals to whom such leases, licences etc. are granted.

Having regard to the purposes of the Act, I think the better view is that the prohibition of the use of land except in compliance with the Act applies to the person who physically occupies and uses the land, irrespective of whether he may be a Crown tenant. In other words, the right to make use of Crown land free of the restrictions imposed by the Act is a right inherently belonging to the Crown, to be exercised only by the Crown itself, and not capable of being transmitted to other persons to be exercised by them for private purposes.

As to the second ground of appeal, the Appellant's contention is that sawmilling is a use ancillary (and therefore "accessory") to the predominant use of forestry. Mr Katz advances two arguments. Firstly, that where the Council's Code of Ordinances refer to accessory uses, it means uses accessory to one of the listed predominant uses carried on on the same land. And

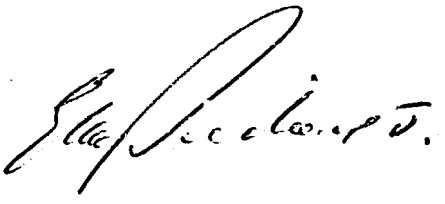
secondly, Mr Katz submits that if "accessory" is synonomous with "ancillary", sawmilling is not ancillary to forestry but is a separate and distinct activity. As to the first point, Clause III or Ordinance I of the Council's Code of Ordinance contains a number of definitions, including the following:-

> "Accessory Building" means a building, the use of which is incidental to that of any other building or buildings on the site and, in relation to a site on which no buildings have been erected, incidental to the use existing and permitted on that site; provided that in relation to a residential site on which no dwelling has yet been erected; a standard type "toolshed" is the only accessory building that may be erected; provided also that a fence erected on a boundary is not an accessory building with regard to bulk and location requirements.
>
> "Ancillary" has the same meaning as Accessory.

Although the word "accessory" is not defined (except in conjunction with the word "building") it appears to me that when the authors of the District Scheme used the word "accessory" in item (k), it was the intention that the uses permitted under item (k) as predominant uses should be limited to uses ancillary or accessory to one or other of the previously listed uses carried on on the same land. However, I need not determine that point as I am of the view that sawmilling is neither accessory nor ancillary to forestry. It is a secondary industry which utilises the products of forestry; but that does not, as I see it, suffice to characterise it as an ancillary to forestry, any more than woollen mills are to be

characterised as ancillary to sheep farming or freezing works to stock farming. "Forestry" can be defined as the science or art of managing forests - which, by definition, are large tracts of land covered in growing trees. No doubt logging operations are either incidental to or ancillary to forestry. But, both "ancillary" and "accessory" carry the connotation of a subordinate relationship which is not, in my view, appropriate to the relationship between timber milling, which is an industrial use, and the management of forests to produce the raw materials for that industry.

Accordingly, this appeal is dismissed. There will be no order as to costs.



Solicitors

Messrs Martellie McKegg Wells & Cormack, Auckland, Solicitors for Appellant;

Crown Law Office, Auckland, for Respondent.

Court File

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~~ORAL~~ JUDGMENT OF PRICHARD, J.

Reserved decision delivered by me this 10th day of May 1984 @ 10 am by me

Deputy Registrar

Martelli McKegg Wells & Cormack.

Mr Byers (Solr for Appellant

Mr Katz (Solr for Respondent)