WGL, PAR, MC-W

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1848/88

IN THE MATTER of an Application for Review under Part I of the Judicature Amendment Act 1972

AND UNDER the Construction Act 1959

BETWEEN: [redacted] HALLETT
of Auckland,
Photographer

Plaintiff

A N D: [redacted] ATTORNEY-GENERAL
(sued in respect of the Minister of Labour and in respect of the Department of Labour)

Defendant

Hearing: 15 December 1988

Judgment: 4 January 1989

Counsel: R D Wallis and F P Zegers for plaintiff
J C Pike for defendant

JUDGMENT OF HENRY, J.

In this action the Plaintiff seeks judicial review of a decision by the Department of Labour not to institute a prosecution against Mainzeal Corporation Limited (Mainzeal) in respect of alleged breaches by that company of provisions of the Construction Act 1959 and the Construction Regulations 1961. The prayer for relief contained in the amended statement of claim sought three separate declarations as follows :

(a) A declaration that the defendant has not given proper consideration as to whether it should or should not initiate a prosecution against Mainzeal under the Act and/or the Regulations.

(b) A declaration that the defendant should give proper consideration as to whether it should or should not initiate a prosecution against Mainzeal under the Act and/or the Regulations taking into account relevant considerations and leaving out of account irrelevant considerations.

(c) A declaration that the defendant should initiate a prosecution against Mainzeal under the Act and the Regulations.

Following the hearing of an application by the defendant to strike out the claim Gallen J. in a reserved judgment delivered on 25 November 1988 struck out paragraph (c) of the prayer, leaving paragraphs (a) and (b) requiring decision at this substantive hearing.

The relevant facts which are in essence not in dispute can be stated briefly. Mainzeal is the owner of a property situated at Durham Lane, Auckland, on which was erected a building some 150 years of age known as Brown's Mill. The building had been classified under the Historic Places Act 1980 which had the effect of protecting it from demolition without the consent of the Historic Places Trust. Mainzeal appealed against the classification which the Trust consequently removed but intending to reconsider the issue and possibly to reclassify the building. Before that could be done

Mainzeal, wanting and intending to redevelop the site, immediately moved to give effect to its intention and engaged a contractor, Burrell Demolition Limited, to demolish the building. Operations commenced at about 5:00 a.m. on 5 August 1988 and by 7:30 a.m. virtually all that remained of Brown's Mill was a heap of rubble. At the time demolition commenced no relevant permit had been obtained from the Auckland City Council as required by its by-laws. Such an application, bearing date 4 August 1988, was presented to the Council on the morning of 5 August 1988, but a permit was not issued as the work had already been done. The application was then amended to refer only to a small portion of the building which then remained in the area of the electrical switchboard, and that amended application understandably in the circumstances was granted. On that same morning Mainzeal requested the Auckland Electric Power Board to remove the supply of electric power to the site, that request being referred at about 8:00 a.m. to Mr Long an assistant safety officer employed by the Board. He immediately went to the site and found the building almost entirely demolished with only the front left corner remaining standing and apparently unsecured. The switchboard was contained in that corner and an examination showed that it was still live and that current was still running from the main in the street. The distribution fuses and the fuse carriers had been removed

which had the effect of cutting off supply to the rest of the building including those parts which had been demolished. Mr Long deposed that this procedure was insufficient to make the site safe, it being as he put it only isolated but not disconnected. He also referred to circumstances as he found them which created what he described as a potentially lethal situation. As I understand it in respect of those premises the Board's contract for supply was with the tenant, not Mainzeal, the tenant had made no request for termination and was in fact totally unaware that demolition was taking place.

Following an indication from the Department of Labour that it did not intend to prosecute Mainzeal in respect of the demolition, these proceedings were instituted seeking the relief earlier outlined. Although Mainzeal is not a party to this application and consequently has not been heard on it, the clear inference from the present evidence is that the company took advantage of a temporary situation which had arisen following the classification removal. It is difficult to see why it would not otherwise have proceeded through the usual channels of authorisation in which it was no doubt well versed.

Mr Wallis for the Plaintiff identified a number of offences which he submitted the evidence

available to the Department disclosed Mainzeal as possibly having committed, namely :

1. Commencing a notifiable work which had not been notified to the Inspector (s.8 (5) Construction Act 1959).

2. Failing to obtain a demolition permit from the Auckland City Council as required by its by-law (s.22, s.11 (f) Construction Act 1959).

3. Failing to comply with the Electrical Wiring Regulations 1976 (s.22, s.11 (f) Construction Act 1959).

4. Committing an offence under s.45 of the Electrical Registration Act 1979 by carrying out work dangerous to life (s.22, s.11 (f) Construction Act 1959).

5. Failing to take reasonable precautions to prevent accidental collapse of part of the building as required by Reg.126 (1) Construction Regulations 1961 (s.22 Construction Act 1959).

6. Cutting or releasing building materials when there was a likelihood of injury to persons or damage to property as required by Reg. 126 (2) Construction Regulations 1961 (s.22 Construction Act 1959).

7. Leaving standing a portion of building in breach of the Auckland City Council by-laws governing demolition. (s.22, s.11 (f) Construction Act 1959).

8. Failing to exercise supervision of workers so as to ensure the provisions of the Construction Act 1959 and the Construction Regulations 1961 were complied with as required by s.11 (a) of the Act (s.22, s.11(f) Construction Act 1959).

9. Failing to take all reasonable precautions to ensure the safety of workmen employed in the work as required by s.11 (b) of the Act (s.22, s.11 (f) Construction Act 1959).

Although he did not address any of these particular allegations in detail, Mr Pike for the Defendant did not challenge that the evidence disclosed facts sufficient to lay an information or informations on some of the matters raised. His challenge to the application for review concentrated on the legal issues raised, which will now require separate consideration. Before doing so reference should be made to a particular provision of the Construction Act 1959, namely s.26, which provides :

> "26. Proceedings to be before Magistrate alone:
> (1) All proceedings in respect of offences or matters of complaint under this Act shall be taken in a summary manner and shall be heard before a Magistrate alone.

> (2) Except as provided in section 25 of this Act, all such proceedings as aforesaid shall be taken only on the information or complaint of an Inspector who shall no be called upon to prove that he holds that office and all such proceedings may be continued and conducted by the same or any other Inspector or any person permitted by the Magistrate to conduct the same."

Section 25 has no present relevance, and accordingly it is not open to a private individual to lay an information for a breach of the Act, hence the need as seen by the Plaintiff to commence these proceedings in an attempt to require the Department to do so through an Inspector. I observe that no such restriction appears to apply to the alleged breach of s.45 of the Electrical Registration Act 1979, but in my view in the overall context nothing turns on that point.

Exercise of a Statutory Power:

Relief under s.4 of the Judicature Amendment Act 1972 is dependent upon there having been an exercise of a statutory power as defined in s.3 of that Act. Mr Wallis relied on the power being one within the definition of the phrase as contained in paragraphs (b) and (e), namely :

> "3. (b) To exercise a statutory power of decision; or
>
> ...
>
> (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.
>
> "Statutory power of decision" means a power or right conferred by or under any

> Act, [or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting] -
>
> (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."

What is in issue here is the making of a decision not to prosecute under the Construction Act 1959. The administration of the Act is entrusted to the Department of Labour (s.33). The Act creates offences, and provides as I have earlier noted that an information for proceedings for an offence under the Act can only be laid by an Inspector. Section 7 lists what are described as powers and duties of Inspector, subsection 1 (f) providing :

> "7. (1) Every Inspector may -
>
> (f) Exercise such other powers and authorities as may be necessary for carrying this Act and the regulations thereunder into effect."

In my judgment it is clear that the Department, being charged with the duty to administer the Act, is clothed with the power and also the duty to decide in any particular fact situation of which it is properly seised whether or not to prosecute.

That decision may but not necessarily must lie with an Inspector, and if made in the affirmative the procedural implementation of it then follows through the use of s.26. Mr Pike drew a distinction between the exercise of a function and the exercise of a power, relying on New Zealand Stock Exchange v Listed Companies Association Inc. [1984] 1 NZLR 699. In that case it was held that the right to suspend listing on the Stock Exchange was conferred by and exercised under the contract between the Exchange and the company, and the Court contrasted the conduct of a statutory body with the exercise of a statutory power. No such distinction can arise in the present case. The decision to prosecute and the implementation of a prosecution can only derive from the statutory powers invested in the Department and its appropriate officers - no other source exists. Similarly, as regards a decision not to prosecute. That is part of the exercise of a power "to enquire into the duties and liabilities of persons", and it is also the exercise of a right conferred under the Construction Act 1959 "to make a decision affecting the duties and liabilities of persons". In so far as it may also be necessary under the Judicature Amendment Act 1972 for the exercise of the power to be one which has a final determinative effect as is suggested in Daemar v Gilliand [1979] 2 NZLR 7, 15 (a matter on which I make no finding but simply note that s.3 is not restrictive in its

wording) then this particular decision was determinative in that sense. The decision not to prosecute meant that no prosecution under the Construction Act 1959 would in fact eventuate and that possibility was for practical purposes at an end. The possibility of a private or other official prosecution separately and independently on the one matter relating to the Electrical Registration Act 1979 is I think irrelevant to the broad issue. I would also be of the view that a decision to prosecute would be determinative, in that once made proceedings through the Court system would follow as a matter of course. Once instituted, proceedings would require a defendant to be subjected to the Court process. I therefore hold that this was the exercise of a statutory power as defined.

Is the decision reviewable?

The fundamental issue under this head is whether the positive exercise of a discretion not to prosecute made in this instance by the appropriate enforcement authority is reviewable. It is necessary firmly to keep in mind the circumstances which are presently under consideration. A decision not to prosecute was taken, that decision being related solely and peculiarly to the actions of Mainzeal in relation to the demolition of Brown's Mill on 5 August last. It is accepted by Mr Wallis that there is a discretion vested in the Department whether or not to prosecute in a particular

case. The reasons advanced in support of review are that relevant considerations were not taken into account and irrelevant considerations were taken into account in a number of respects set out in the pleadings as follows :

It (the Department) has failed to take into account these relevant matters :

(a) The purpose of the Act and Regulations being to promote safety in the construction industry.

(b) The apparently dangerous nature of the apparent breaches of the Act.

(c) The apparently deliberate nature of the apparent breaches of the Act.

(d) The part those apparent breaches played in facilitating Mainzeal's wider objective.

(e) The clandestine manner in which Mainzeal committed the apparent breaches.

(f) The public awareness, interest and concern in the matter.

(g) The ease with which proof of the apparent breaches could be established at a trial.

(h) The clear nature of the apparent breaches.

It has taken into account these irrelevant factors :-

(a) The expense of a prosecution.

(b) The drain on the defendant's staff resources in initiating and pursuing a prosecution.

In the course of submissions Mr Wallis acknowledged that the "irrelevant factors" did or could have relevance, and that the real complaint was as to the

undue weight inferentially given them in reaching the decision. It will be seen from these allegations that the foundation of the Plaintiff's case lies in the ability to examine the reasons for a particular decision as to prosecution. Only then can a determination be made whether the decision not to prosecute on one or more of the possible offences was unreasonable - and unreasonableness is the only challenge made to the decision.

Mr Wallis sought to distinguish the present case from those where there had been a positive decision to prosecute criminal proceedings, submitting that in such cases there was no breach of duty to enforce the law and that the aggrieved party had other effective avenues for redress against vexatious or oppressive use of the power to prosecute. I am unable to see any such distinction. If the decision is reviewable logically it must be so regardless of which way the decision goes. The question of jurisdiction to review is not to be confused with the discretionary power to give relief.

In order to obtain relief under s.4 of the Judicature Amendment Act 1972 a plaintiff must show an entitlement to relief by way of, or of the nature of, one of the extraordinary remedies derived from the inherent powers of the Court (Saywell v Attorney-General [1982] 2 NZLR 97, 100; Daemar v Gilliand [1979] 2 NZLR 7, 16).

As a matter of principle the Court, which is entrusted ultimately with determining guilt or innocence, should not become too closely involved in the question of whether a prosecution should be commenced (Connelly v Director of Public Prosecutions [1964] AC 1254; Director of Public Prosecutions v Humphrys [1977] AC 1. ("A Judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred" - per Viscount Dilhorne at p.26). That principle of course does not affect the Court's jurisdiction to ensure there is no abuse of process, an issue which does not arise here. Examples of the Court refusing to review a prosecution decision or instruction can be found in R v McAulay & Others ex parte Fardell (1979) 2 NTR 22 (restrictive instruction as to issue of search warrants); Saywell (sup.cit.) (presentation of indictment); Barton v The Queen (1980) 32 ALR 449 (presentation of indictment); Imperial Tobacco Ltd & Anor v Attorney-General [1980] 1 All ER 866 (declaration sought that a lottery scheme then subject to criminal prosecution was lawful). Other cases where the same principle has been applied include Hill v Chief Constable of West Yorkshire [1987] 2 WLR 1126, Newby v Moodie & Another (1987) 78 ALR 603, R v Toohey; ex parte Northern Land Council (1981) 151 CLR 170 and Police v Hall [1976] 2 NZLR 678. The primary authority relied upon by Mr Wallis was

Regina v Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118, in which challenge was made to a policy decision not to enforce certain gaming laws in London clubs. The Court of Appeal held that the Commissioner owed a duty to the public to enforce the law which he could be compelled to perform, and that his discretionary policy decisions were not absolute. That is clearly distinguishable. The present case involves no question of general policy but on the contrary is one where a specific decision on the facts has been made, which is precisely the kind of decision with which Blackburn itself indicates that the Court will not interfere, Lord Denning MR at p.136 saying :

> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere . For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter."

In effect in Blackburn the legal duty to enforce the laws was not being performed in that the prosecuting authorities failed to consider the question of prosecution at all because of the policy decision.

Reference was also made to a dictum of Cooke P. in Amery v Attorney-General [1987] 2 NZLR 292

to the effect that a stay of proceedings by the Solicitor-General pursuant to s.173 of the Summary Proceedings Act 1957 may be reviewable, but I do not see that as in conflict with the general principle to which I have referred. At such a stage the Court itself is seised of the prosecution, and there could be said to be merit in the contention that the Court's overall control should remain. The position here in contrast is the initiation of proceedings.

I do not think it could possibly be said that here there has been a failure to exercise the discretion whether or not to prosecute - on the contrary that discretion clearly has been exercised. There are no statutory requirements to be obeyed in reaching it which could be said to have been breached so as to make it a nullity, and on examination what is really being suggested is that the weighing of the various factors which go to making the decision was erroneous, and that in my view is an area not open to review by this Court. That is not to say and I do not say that the decision is free from criticism, but that is quite different from saying it is open to review in the equivalent of extraordinary remedy proceedings.

My conclusion in this regard is reinforced by the difficulties which became apparent in considering the

form of any declaration which could be made. What is "proper consideration"? What are the "relevant considerations"? What are the "irrelevant considerations"? Mr Wallis suggested an amendment to prayer (b) directing the Defendant to take into account inter alia as relevant considerations those factors set out as such in the amended statement of claim, and not to give undue weight to those described as irrelevant. I think such a direction is fraught with obvious problems and goes to emphasise the necessity to apply the principle to which I earlier referred.

When the present claim is analysed it becomes clear that it breaches that principle. The very substance of the claim is that a decision not to prosecute could not reasonably have been made in the circumstances of this case. To accede to that claim in effect requires the Court to find that the Defendant's obligation was to prosecute, a step which as I understood him Mr Wallis acknowledged was beyond the Court's proper area of involvement, as well as being the form of relief earlier struck out by Gallen J. The remaining declarations sought in the particular circumstances are really saying the same thing, based as they are on the premise that the decision not to prosecute Mainzeal for its actions was unreasonable. The Department has in fact exercised its discretionary power and made a decision

and in my judgment that decision is not reviewable on the ground that factors leading to it have not been properly weighted.

I have not dealt with the question whether the power to initiate a prosecution is the exercise of a prerogative power, Mr Pike accepting that this was not an issue (Council of Civil Services Union v Minister of Civil Services [1984] 2 All ER 935).

Plaintiff's Status to Sue:

Mr Pike submitted that in truth the Plaintiff here is not Mr Hallett, a photographer employed by the Auckland Star, but Auckland Star Limited, proprietor of the daily newspaper which has given wide publicity to the demolition of Brown's Mill and to the actions of Mainzeal in that regard. I do not overlook the reality of that situation, and as did Gallen J. on the application to strike out I place little weight on the fact that Mr Hallett was on the scene with another employee, a journalist, by about 7:30 a.m. and subjected thereby to possible danger from the alleged unsafe nature of the site.

The Courts in recent years have taken a more liberal attitude to the question of standing, as exemplified in Environmental Defence Society Incorporated v South Pacific Aluminium Limited (No.3) [1981] 1 NZLR 216

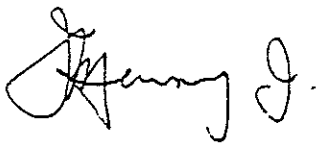
adopting Inland Revenue Commissioners v Federation of Self-Employed and Small Businesses Limited [1981] 2 WLR 722. It is not necessary to reach a firm conclusion on this issue because I have concluded that the decision is not open to review, but I doubt in the light of these authorities that I would have refused relief on this ground. The Court should be slow to reject a claim on technical grounds of status if matters of genuine public interest warranting judicial considerations are properly raised. I would place little weight on the fact that a private prosecution is open in respect of an offence under s.45 of the Electrical Registration Act 1979. I note also the observation of Somers J. in Consumers Co-operative Society (Manawatu) Limited v Palmerston North City Council [1984] 1 NZLR 1, 6, that the determination of standing is not ordinarily practicable until the nature and scope of the statutory duty has been ascertained and the nature and quality of the breach found. Had there been a clear breach of duty warranting the intervention of the Court, it may well be a genuinely interested member of the public should not be denied access to the Court process.

Conclusion:

For the reasons earlier expressed I find that the decision not to prosecute Mainzeal for offences under the Construction Act 1959 arising from the demolition of

Brown's Mill on 5 August 1988 is not reviewable by the Court under s.4 of the Judicature Amendment ACt 1972. The application is accordingly dismissed.

Costs are reserved.



Solicitors:

Brandon Brookfield, Auckland, for plaintiff
Crown Law Office, Wellington, for defendant

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CP.1848/88

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A N D: THE ATTORNEY-GENERAL (sued in respect of the Minister of Labour and in respect of the Department of Labour)

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