IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2008-409-003095

IN THE MATTER OF	the New Zealand Bill of Rights Act 1990
BETWEEN	DAVID JOHN YOUNG Plaintiff
AND	CHRISTCHURCH CITY COUNCIL First Defendant
AND	GRAHAM MATHER Second Defendant
AND	GRANT COUSENS Third Defendant

Hearing: 2 April 2009

Appearances: Plaintiff in Person
K G Reid for Defendant

Judgment: 9 April 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

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[1] This is an application for judicial review.

[2] It concerns the application of s 27 of the New Zealand Bill of Rights Act 1990 ("NZBORA") to actions taken by a local authority under the Building Act 2004 and the Local Government Act 2002.

Factual background

[3] The plaintiff, Mr Young, is the sole director of a company called Goodman Investment Nominee Limited ("Goodman"). The second and third defendants are

both enforcement officers employed by the Christchurch City Council ("the council").

[4] Goodman owns a property situated at 163 Maces Road Christchurch where Mr Young operates a battery and tyre retail outlet.

[5] In 2007, Mr Young applied to the council for building consent to carry out certain alterations to a building on the Maces Road property. The council considered the building plans were insufficiently detailed, and did not accept them for consideration.

[6] Meantime, Mr Young had reached the view that in fact the type of building work he was proposing to undertake did not require a consent but came within the categories of exempt building work detailed in Schedule 1 of the Building Act 2004.

[7] The council did not share that view, and having discovered in May 2008 that Mr Young was undertaking the building work without a consent, served a notice to fix on 2 July 2008. The notice required Goodman to remove the building work or apply for a certificate of acceptance.

[8] Mr Young continued to insist the work was exempt, and on 6 August 2008 the council acting through the second defendant, Mr Mather, issued an infringement notice for the offence of failing to comply with a notice to fix.

[9] Mr Young is defending those proceedings, and a hearing has been set down for next month in the District Court.

[10] In December 2008, a second dispute arose between Mr Young and the Christchurch City Council, this time concerning the storage of tyres on the Maces Road property. Approximately three and a half years ago, Mr Young erected what he describes as a boundary fence comprised of a stack of used tyres. The tyres formed a tyre wall along the property and connecting up to the building.

[11] On 2 December 2008, there was a suspicious fire at the premises and the stack of tyres was burnt. Prior to the fire, the council had received several

complaints from neighbours and anonymous complainants that the tyres were a fire hazard.

[12] The Fire Service attended the fire and subsequently sent an email to the council advising that the tyres comprised an imminent fire hazard as they were stacked against the warehouse building.

[13] The council then invoked its powers under s183 of the Local Government Act 2002, and on 10 December 2008 served a written notice on Mr Young to remove the tyres from the property within 24 hours. The notice was served on Mr Young by the second defendant, Mr Cousens.

[14] Mr Young started to do some work to remove the tyres but it was not completed within the 24 hour deadline.

[15] The council then engaged contractors to remove any remaining waste tyres stacked outside the building and charged Mr Young with the costs which amounted to some $3,338.44.

[16] Since then matters have escalated still further, with Mr Young reconstructing the tyre wall, the council issuing a further notice and contractors again removing the tyres, followed by Mr Young threatening to shoot anyone who interferes again with the boundary fence. This last matter has been the subject of a complaint to the police.

The plaintiff's claim

[17] The statement of claim pleads two causes of action, one in respect of the issue of the infringement notice in August 2008, and the other the removal of the tyres.

[18] Mr Young's complaint in respect of the decision to issue the infringement notice can be conveniently summarised as follows:

(i) He had a right to erect the building work without the need for a consent because it was exempt building work. The issuing of an infringement notice breached this right which in turn amounts to a breach of s 27 NZBORA.

(ii) Before issuing the infringement notice, the council should have given him notice of its intention to do so and an opportunity to be heard. Its failure to observe the rules of natural justice also constitutes a breach of s 27 NZBORA.

(iii) The council breached its obligations under s 48 of the Building Act 2004 in failing to advise him within 20 working days whether his application for a building consent had been accepted or refused.

[19] Mr Young seeks compensation of $50,000.

[20] As regards the second cause of action relating to the tyres, Mr Young contends that:

i) the tyres were not a fire hazard;

ii) even if they were a fire hazard the council having served a written notice was required by s 183 of the Local Government Act to give him a month to remove the tyres, not 24 hours;

iii) the costs which have been imposed on him are unreasonable because they include the cost of removing some tyres from trailers and the cost of sweeping the yard, neither of which were necessary to remove a fire hazard.

[21] Mr Young seeks monetary compensation in respect of the second cause of action as well as a Court order enjoining the council from interfering with the tyre wall.

Consideration

The issuing of the infringement notice

[22] The council's power to issue an infringement notice derives from s 372 of the Building Act 2004.

> **372 Issue of infringement notices**
>
> (1) An infringement notice may be served on a person if an enforcement officer—
>
> (a) observes the person committing an infringement offence; or
>
> (b) has reasonable cause to believe that an infringement offence is being or has been committed by that person.
>
> (2) An infringement notice may be served—
>
> (a) by an enforcement officer (not necessarily the person who issued the notice) personally delivering it (or a copy of it) to the person alleged to have committed the infringement offence; or
>
> (b) by post addressed to the person's last known place of residence or business.
>
> (3) For the purposes of the Summary Proceedings Act 1957, an infringement notice sent to a person under subsection (2)(b) must be treated as having been served on that person when it was posted.

[23] There was no evidence to suggest that in issuing the infringement notice, Mr Mather acted in bad faith. It is clear the council genuinely consider the work is not exempt, just as Mr Young genuinely believes it is exempt. In my view, the appropriate forum for resolution of that issue is the District Court criminal proceedings, not in this Court.

[24] What is essentially at issue in these judicial review proceedings is the exercise of a prosecutorial decision. In my view, whether Mr Young's claim is analysed in terms of substantive unreasonableness or breach of natural justice, it cannot possibly succeed.

[25] It is well established that as a general rule a decision to prosecute is not reviewable , subject only to some very limited exceptions, none of which apply here:

Thompson v Attorney-General [2000] NZAR 583; *Polynesian Spa Ltd v Osborne* [2005] NZAR 408; *Wilson v Auckland City Council (No 2)* [2007] NZAR 711.

[26] Mr Young acknowledged those authorities but submitted they were over-ridden by s27 (2) the New Zealand Bill of Rights Act 1990:

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

[27] However, the operative words are "in accordance with law." Section 27(2) does not purport to oust or trump established judicial review principles such as those articulated in the authorities about prosecutorial decisions.

[28] I also do not accept Mr Young's further argument that the council breached the rules of natural justice and hence s 27(1) of the Bill of Rights Act 1990 in issuing the infringement notice. Quite apart from anything else, he had in fact stated his case on more than one occasion to the council as to why the work should be considered exempt before the infringement notice was issued. The fact they did not agree with him does not amount to a breach of natural justice.

[29] The argument based on s 48 of the Building Act is also untenable.

> **48 Processing application for building consent**
>
> (1) A building consent authority must, within 20 working days after receiving an application for a building consent that complies with section 45,—
>
> (a) grant the application; or
>
> (b) refuse the application.
>
> (2) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application, and, if it does so, the period is suspended until it receives that information.

[30] Mr Young says s48(1) means the council was obliged to either grant or refuse his application within 20 working days of his submitting it to them. They did neither.

[31] However, it is clear from the wording of s 48 that the obligation to either refuse or consent only arises if and when the application satisfies the requirements of s 45. The council's contention is that the documentation did not comply with s 45, an assertion which is supported by the affidavit evidence.

[32] A further argument raised by the council is that Mr Young's first cause of action borders on an abuse of process, raising as it does exactly the same issues as have been raised in the criminal proceedings due to be heard in the District Court on 4 May 2009. I agree.

[33] When I asked Mr Young why he chose to issue judicial review proceedings about the infringement notice given the pending District Court hearing, he stated it was not about the money but to make the defendants accountable.

[34] I do not doubt Mr Young's sincerity but the issuing of the proceedings was misconceived including the claim for monetary compensation. In *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee* [2008] NZCA 423, the Court of Appeal held it was still uncertain whether damages are available for a breach of s 27(1)(c) of the NZBORA, and also stated that even if they are available, awards are likely to be rare and confined to circumstances:

> [70] …. where there is no other effective remedy, where human dignity or personal integrity or (possibly) the integrity of property are also engaged and where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse.

[35] The facts of the present case are clearly far removed from the sort of case contemplated by the Court of Appeal as being appropriate for an award of damages.

The removal of the tyres

[36] The affidavit evidence including as it does the expert opinion of the fire service satisfies me that the tyres did constitute an imminent fire hazard.

[37] Indeed, in my view, it would have been remiss of the Council not to have acted once it had received the advice from the Fire Service.

[38] In support of his argument that the giving of only 24 hours notice was unlawful, Mr Young relies on s 183 of the Local Government Act.

> **183 Removal of fire hazards**
>
> (1) A territorial authority may, by notice in writing, require the occupier or (if there is no occupier) the owner of land to cut down, eradicate, or remove any growth on the land or to remove or destroy any matter on the land if the growth or matter is likely to become a source of danger from fire in the opinion of—
>
> (a) the chief executive officer of the territorial authority; or
>
> (b) the Chief Fire Officer of the New Zealand Fire Service; or
>
> (c) if the land is in a rural fire district under the Forest and Rural Fires Act 1977, a rural fire officer.
>
> (2) A resident of the district may, by notice in writing to a territorial authority, request the territorial authority to issue a notice under this section.
>
> (3) If the territorial authority has not, within 1 month after the notice, complied with the request, the resident may apply to a District Court for an order requiring the territorial authority to comply with the request.
>
> (4) On hearing the application, the court may order that the territorial authority comply with the request or cancel the request.
>
> (5) A territorial authority may, after oral notice from an authorised officer of the territorial authority to the occupier or (if there is no occupier) the owner, eradicate or remove growth or remove or destroy matter on land in its district if the growth or matter is an imminent danger to life, property, or any road.
>
> (6) The cost of work done under subsection (5) is a charge on the land.
>
> (7) The powers in this section—
>
> (a) are in addition to any powers a territorial authority has under any other enactment; and
>
> (b) may be exercised in accordance with any agreement or arrangement under section 14(2) of the Forest and Rural Fires Act 1977.
>
> (8) In this section,—
>
> **cut down** means cutting down and keeping cut down, or removing or controlling by chemical means, the stem and roots of a tree so as to prevent the tree from throwing out leaves, offshoots, or flowers

> **growth** means broom, gorse, scrub, weeds, undergrowth, dry grass, or other growth on land, whether or not it is standing or growing
>
> **matter** means accumulated refuse or flammable waste.

[39] Section 183 contemplates two situations – the first where the matter which needs to be removed is "likely to become a source of danger from fire" and the second where "there is an imminent danger." In the first less urgent situation, the occupier has one month after being served with a written notice to rectify the situation, whereas in the second situation, the local authority may after giving oral notice to the occupier remove the matter itself and impose the cost of the work as a charge on the land.

[40] Mr Young contends that because the council gave him a written instead of an oral notice, it was obliged to follow the one month procedure.

[41] For its part, the council says it was not obliged to give written notice but chose to do so.

[42] The notice that was given to Mr Young quotes the whole of s183. However, at the same time, it does also make it clear that the council is proceeding under subs (5).

[43] In my view, it would be a very curious result if by extending latitude to an occupier by giving him 24 hours written notice, that of itself means the council is somehow prevented from exercising its powers under subs5. At all times, the only issue must be whether there is or is not an imminent danger.

[44] It follows that in my view, the council was not required to give Mr Young a month to remove the tyres and there has been no breach of the NZBORA.

[45] As mentioned above, Mr Young also disputes the reasonableness of the charge that has been imposed. He has not been provided with a copy of the invoice or a detailed breakdown as to how the amount has been calculated. On the face of it, the charge does not appear to be unreasonable. Mr Young's concern was that the

invoice included more than the removal of the tyres. However, that does not in fact appear to be the case.

[46] In my view, the second cause of action is also clearly untenable and must also fail.

[47] My view of the substantive merits of the claim means it is unnecessary for me to rule on a procedural issue raised by the defendants – namely whether it was appropriate for Mr Young to have joined Messrs Cousens and Mather as defendants in their personal right when at all material times they were simply acting as the council's agents exercising the council's statutory functions and when there is no suggestion of bad faith or misfeasance on their part. Suffice it to say that in my view, the second and third defendants should not have been joined.

Costs

[48] The general rule is that an unsuccessful party should pay the costs of the successful parties.

[49] I have not heard submissions on costs but it may be helpful to the parties if I express a provisional view. My provisional view is that the general rule should apply and Mr Young pay the costs of the successful defendants on a 2B basis. In this case, the defendants were all represented by one counsel. Accordingly, I do not consider there should be three separate awards.

[50] If however the parties are unable to agree on costs and require me to make a ruling, then I reserve leave for the parties to file submissions on the issue of costs. These submissions are to be filed within 21 working days and to be no more than five pages in length.

Solicitors:
Appellant in person: D J Young, Christchurch
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