IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CRI-2008-419-000025

TE PURU HOLIDAY PARK LIMITED
AND
RONALD ANTHONY JULIAN
Appellants

v

THAMES COROMANDEL DISTRICT COUNCIL
Respondent

Hearing: 25 July 2008

Appearances: M D Talbot for the Appellants
M C Frogley for the Respondent

Judgment: 30 June 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 30 June 2009 at 2.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: McCaw Lewis Chapman P O Box 9348 Hamilton 3240 for the Appellants
Brookfields P O Box 240 Auckland 1140 for the Respondents

Copy To: D J Taylor P O Box 19366 Hamilton 3244

[1] The appellants have appealed against the convictions and sentences imposed on them in the District Court for offences committed under the Building Act 2004 (the Act); namely, failing to obtain building permits for the structures sited on sites C.22 and E.18 at the Te Puru Holiday Park. On 11 May 2009, I delivered a judgment on the appeals against conviction: *Te Puru Holiday Park Limited v Thames Coromandel District Council* HC HAM CRI 2008-419-25 11 May 2009. This judgment should be read together with that judgment.

[2] In the earlier judgment, I dismissed the appellants' appeals against conviction for offences relating to the structure on site C.22 and allowed the appeals for convictions related to the structure on site E.18.

[3] It was then necessary to determine the appeals against the sentences imposed in the District Court for the offences involving site C.22. Notwithstanding that I took a different view of the Act than was taken in the District Court, I found that the structure on site C.22 contravened the Act. I considered that this difference of statutory interpretation might raise new or additional issues for the appeals against sentence. Hence, I provided the parties with an opportunity to file further written submissions for those appeals. The parties have taken this opportunity and further submissions have been filed. Those, as well as the earlier submissions, have been considered in the course of reaching this judgment.

[4] In the District Court, each appellant was fined $5,000, plus court costs of $130, as well as prosecution costs of $2,064.

[5] On appeal, the appellant, Te Puru Holiday Park Limited, (the company), sought the imposition of a nominal or minimal and much reduced fine. The appellant, Ronald Julian, who is a director of the company, sought a discharge without conviction. Both appellants sought to have the costs' orders made against them set aside, and an order that costs lie where they fall to be made instead.

[6] The respondent sought to have the sentences imposed in the District Court confirmed. It made no submission directly on the question of the court and prosecution costs awarded to it in the District Court. However, in its submissions in

reply, it referred to s 389 of the Act, which entitles a prosecuting local authority to payment of 90 per cent of any fine imposed as a means of recouping the costs incurred by the prosecution. This submission was made in the context of the respondent's opposition to Mr Julian receiving a discharge without conviction.

Submissions

[7] The appellants submitted that the degree of culpability found by the District Court was in the moderate range. They acknowledged that the precedents relied upon by the respondent reflected a level of culpability analogous to that range. However, the appellants then went on to submit that, in the present case, their culpability was wrongly characterised by the District Court and that the better description of it is "*de minimus*". The appellants relied upon the following points to support this proposition:

i) The Leisurebuilt duplex unit on site C.22 was manufactured, marketed and sold to the appellants as "new generation caravans and mobile homes" and "trailerised recreational and accommodation units"; and

ii) The units were registered as vehicles within the Land Transport Act 1998 and had registration plates and lights.

[8] The appellant, Mr Julian, conducted investigations that included visiting other campgrounds using Leisurebuilt "trailerised" units, visiting the factory where the units were built, and forming a relationship with a director of the company responsible for building the units. It was contended that these steps had led Mr Julian and, through him, the appellant company, to conclude that the structure purchased for site C.22 was in fact a caravan, and that no building consent was required. It was said that Mr Julian did not knowingly purchase and site the Leisurebuilt duplex unit on C.22 in breach of the Act. To support this proposition, the appellants point to the course of communications between them and the respondent, which, they say, demonstrated that their stance on the character of the

Leisurebuilt units was based on advice from their legal advisors and the lawyers responsible for advising Leisurebuilt.

[9] The appellants submitted that the primary difference between their position and that of the respondent was one of statutory interpretation, namely the meaning to be given to s 8(1)(b)(iii) of the Act. They referred to the fact that despite this Court's confirmation of their conviction for site C.22, this Court adopted their interpretation of the Act, whereas the District Court adopted the interpretation for which the respondent contended.

[10] The appellants say that they overlooked the possibility that the duplex unit might be seen to be a building under s 8(1)(a) through the connection of its constituent parts being found to form a new and distinct structure. They attribute their oversight to their focus being on responding to the respondent's case. They described the respondent as having built its case on the primary statutory interpretation point; namely, did the structures in this prosecution have to be assessed in terms of s 8(1)(b)(iii) to the exclusion of s 8(1)(a). Hence, they gave insufficient consideration to what the outcome might be when the correct interpretation was applied. Furthermore, they submit that insofar as they did consider how s 8(1)(b)(iii) could be applied to the structure on site C.22, they focused on the quality and use criteria expressed in s 8(1)(b)(iii) (immovability and permanent or long-term occupation), rather than on the more fundamental question of whether the duplex unit came within the scope of s 8(1)(b)(iii).

[11] Finally, the appellants contend that the prosecution in the District Court was essentially a test case, with neither party, in either the District Court, or on appeal to this Court, being able to provide precedent cases to assist in the determination of the primary statutory interpretation issue.

[12] For all these reasons, the appellants submit that this Court should reconsider the finding by the District Court that the appellants' culpability is moderate. They contend that the fundamental position they adopted from the outset on the meaning of s 8(1)(b)(iii) has been proven correct. Accordingly, it is submitted that their convictions in relation to site C.22 are not the result of a flagrant breach of the Act

but are instead the result of this Court reaching a finding on how the amalgamation of two Leisurebuilt units can create a new and distinct structure from its constituent parts. In reliance on this view of events, Mr Julian seeks a discharge without conviction on the basis that the conviction may affect his ability to travel overseas and that his conduct was of minimal culpability.

[13] The respondent maintains the stance it took in the District Court that the culpability of each appellant was moderate, and rejects the idea that the offending was no more than *de minimus*. The respondent submits that the sentences imposed on each appellant were appropriate for the level of culpability. To support this submission, the respondent referred to a number of authorities, which establish that the sentences imposed on the appellants fell within the range of sentences for offences of moderate culpability. The respondent strongly opposed Mr Julian's request for a discharge without conviction. This request was originally raised unsuccessfully in the District Court.

Discussion

[14] An appeal such as this is provided for in s 121(3) of the Summary Proceedings Act 1957. Under that section, an appellant must satisfy the Court hearing the appeal that:

a) the lower Court has imposed a sentence which it had no jurisdiction to impose; or

b) has imposed a sentence which is clearly excessive or inadequate or inappropriate; or

c) there were substantial facts relating to the offence or to the offender's character or personal history that were not before the Court imposing sentence, or those facts were not substantially placed before or found by that Court.

[15] No question has been raised about the District Court's jurisdiction to impose sentence on the appellants. Nor has it been suggested that the sentences are clearly excessive or inappropriate for offences involving moderate culpability. The appellants' acceptance of the sentences falling within the range of sentences for moderately culpable offenders precludes any argument that, for offenders in this range, the sentences are excessive or inappropriate.

[16] The remaining basis for varying the sentences imposed in the District Court would be for the appellants to establish that the District Court reached a wrong conclusion on the level of culpability, due to the incorrect view it took of s 8. This is the only new factor that the appellants can point to, either as rendering the sentences imposed inappropriate, or as amounting to a substantial fact that was not placed before or found by the District Court.

[17] The question, therefore, is whether or not the different interpretation this Court gave to s 8, in the appeal against conviction, has substantially altered the level of the appellants' culpability from moderate to something less than that and, if so, by how much. If there was no effect, or an effect that was less than substantial, on the level of culpability, the qualifying grounds under s 121(3) could not be made out, so there would be no basis for varying the sentences.

[18] The interpretation point was novel and I accept that in this regard the prosecution of the appellants was something of a test case. Notwithstanding that view, I find it difficult to see how anyone could have thought the structure as it was sited on C.22 was not a building in terms of s 8(1)(a).

[19] The District Court found that someone with Mr Julian's knowledge of the construction industry would have known of the likelihood the structure qualified as a building under s 8(1)(a). I understand this to be a reference to Mr Julian's involvement in the construction industry, which the Judge considered to give Mr Julian a greater awareness of the general requirements of the Act than might be expected of persons not having his knowledge. The Judge also considered that the stance the appellants adopted on the application of s 8 to the Leisurebuilt units was based on a desire to avoid the Act's requirements and associated costs.

[20] Notwithstanding his experience in the construction industry, Mr Julian cannot be expected to understand subtle differences of interpretation, such as the relationship between s 8(1)(a) and s 8(1)(b)(iii). I also consider that if the Act is seen to impose costs that can be legitimately avoided through the use of transportable structures, which qualify under s 8(1)(b)(iii), then there is nothing improper in legitimate avoidance of those costs. There are, however, attendant risks in seeking to minimise costs in this way. If an error is made in the assessment of what can legitimately be avoided, an offence will be committed. Where the Court considers that the error should have been obvious, the result is likely to lead to the level of culpability being seen as moderate to high.

[21] I consider that the structure sited on C.22 is so obviously unable to be transported in its existing state that it is hard to see how there could be a genuine belief it was not a building and not subject to the requirements of s 8(1)(a). In the case of this structure, I do not consider that the different interpretation taken of s 8 can affect the level of the appellants' culpability. As its director, Mr Julian's knowledge can be attributed to the company and he has accepted this.

[22] Since I am not persuaded that the level of culpability has been lowered by the different view this Court has taken of s 8 from that taken in the District Court, I can see no basis on which to set aside the existing sentences. The appellants have not identified any other errors in the sentencing process adopted in the District Court.

[23] The cases relied on by the respondent in its submissions show that a fine of $5,000 is at the lower end of the financial penalties that can be imposed under the Act for having non-compliant structures used for human accommodation. In *Wilson v Fowler* HC AK AP 2-3-98 16 March 1999, Giles J observed that ordinarily lower scale offences involving non-compliant structures under s 80(1)(a) of the earlier Building Act 1991 could attract penalties starting from $5,000. The more recent cases which the respondent relies upon all show that there has been no material departure from this view. If $5,000 is a starting point for calculating the financial penalties for these types of offences, then, given the appellants' not guilty pleas, the fines imposed on them are well within the range of available penalties. It follows that the appeals against sentence must fail.

[24] Mr Julian submitted that he should be discharged without conviction. However, as I have concluded that there is no basis to set aside the sentences imposed, it is unnecessary to deal with this argument in detail. I note that Mr Julian has not provided sufficient evidence to show that the direct and indirect consequences of a conviction for an offence under the Act would be out of proportion to the gravity of the offence. Mr Julian has simply referred to possible difficulties with overseas travel, and that his conduct was of minimal culpability. I have taken a different view of his culpability. I am satisfied that a discharge without conviction is inappropriate in the circumstances.

[25] I now deal with the costs awarded in the District Court. The award of costs followed the successful prosecution of the appellants in the District Court, and so it is related to the appeal against conviction. The appellants' appeal was brought against both conviction and sentence. Both appeals were heard at the same time. The judgment on the appeal against conviction was delivered first as a separate judgment. This was done to provide an opportunity to address any issues, for the purpose of the sentence appeal, that might be seen to arise from the different view this Court took of the meaning of s 8 of the Act. The judgment on the appeal against conviction was an interim judgment that did not deal with all matters raised in the appeal hearing. I consider, therefore, that it remains open to the Court to deal with the appeal in relation to the costs' award.

[26] An award of costs is at the discretion of the Court hearing the summary prosecution. This is a case where it was clear to me from the volume of material before me on the appeal that the prosecution was obliged to go to some trouble in the preparation and presentation of its case in the District Court. Despite the difference in the interpretation of s 8 of the Act in this Court, the outcome in respect of the structure on site C.22 was the same. There is no reason why the respondent should not be entitled to recover some of the costs associated with the prosecution. There is nothing to lead me to conclude that the award of costs was arrived at in a way that was wrong in principle, that the Judge took account of an irrelevant matter, or that his decision was plainly wrong: *May v May* (1982) 1 NZFLR 165 at p 170. This is the usual test to apply when considering whether or not the exercise of a discretion is open to appeal. Since I can see no basis in principle for interfering with the

District Court Judge's exercise of discretion, the costs' order awarded in the District Court must stand.

Result

[27] The appeals against sentence and the costs awarded in the District Court are dismissed.

Duffy J