EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2016-085-002310
[2017] NZDC 4889

GEORGE BORAMAN
Applicant

v

OTIS ELEVATOR COMPANY LIMITED
Proposed Defendant

Hearing: 2 February 2016

Further submissions: 15 and 17 February 2017

Appearances: Andrew Beck and Hazel Armstrong for the Applicant
Garth Gallaway for the Proposed Defendant

Judgment: 10 March 2017

RESERVED JUDGMENT OF JUDGE S M HARROP
(Application for leave to file out of time a private prosecution charging document under the
Health and Safety in Employment Act 1992)

Introduction

[1] On 14 January 2016 Brendon Scheib was killed in a work accident at the T & G Building, 28 Grey Street, Wellington where he was working on a lift. He was employed as an electrician by Otis Elevator Company Limited ("Otis"). WorkSafe New Zealand attended the scene and commenced an investigation into Mr Scheib's death. His family was told on 11 July 2016 that WorkSafe did not intend to lay charges against Otis.

[2] On 13 July 2016 Mr Scheib's cousin George Boraman, pursuant to s 54(1) of the Health and Safety in Employment Act 1992[1], ("the Act") notified WorkSafe that he had an interest in knowing whether enforcement action would be taken by an inspector.

[3] On 20 July 2016, pursuant to s 54(2) of the Act, WorkSafe formally advised Mr Boraman that the investigation had been completed and a decision made not to take enforcement action.

[4] Notwithstanding s 25 of the Criminal Procedure Act 2011, a charging document alleging an offence against the Act must, as stipulated in s 54B, be filed within 6 months of the date when the incident became known or should reasonably have become known to an inspector. Here there is no doubt that WorkSafe were aware of the incident on the day it happened so the limitation period ended on 14 July 2016, six days before Mr Boraman was advised of the decision not to lay a charge.

[5] Section 54C of the Act provides:

> **"[54C Extension of time for person other than inspector to [[file charging document]]**
>
> (1) This section applies if—
>
> (a) an inspector or another person has not taken enforcement action in respect of a matter; and
>
> (b) [[WorkSafe]] has notified relevant persons under section 54(2)(a) that an inspector has not and will not take enforcement action against any possible defendant in respect of the matter.
>
> (2) On application, the District Court may extend the time for a person other than an inspector to [[file a charging document]].
>
> (3) An application under subsection (2) must be made within 1 month after receiving notice from [[WorkSafe]] under subsection (1)(b).
>
> (4) The Court must not grant an extension of time unless it is satisfied—

[1] Despite the passing of the Health and Safety at Work Act 2015, which took effect on 4 April 2016, by virtue of the transitional provision in clause 26(2) of Schedule 1 to that Act, the 1992 Act continues to apply to this case because the incident involving Mr Scheib occurred before it came into force.

(a) that another person wishes to decide whether to [[file a charging document]] in respect of that matter; and

(b) it is unreasonable, having regard to the time taken by an inspector to respond to the matter, to expect, or to have expected, the person to make that decision before the 6-month period referred to in section 54B expires; and

(c) an application under section 54D has not been made.

(5) The Court must give the following persons an opportunity to be heard:

(a) the person seeking the extension:

(b) any proposed defendant:

(c) any other person who has an interest in whether or not [[a charging document should be filed]], being a person described in section 54(1).]

[6] As can be seen s 54C(2) empowers the District Court to extend the time for a person such as Mr Boraman to file a charging document. Any such application must under s 54(3) be made within one month of receipt of the notice that WorkSafe is not taking enforcement action so Mr Boraman had to apply by 20 August 2016. He did so.

[7] On 16 August 2016, within that statutory one month, Mr Boraman duly filed an application dated 12 August 2016 seeking "a further 4 month period from the date of the Order extending time, for the applicant to file any charging documents." He filed two affidavits in support.

[8] On 6 September 2016, the parties filed a joint memorandum signed by their respective counsel recording that although the matter had been set down for a hearing on 19 September 2016 the parties sought leave for their appearance to be excused and for the matter to be considered on the papers.

[9] Paragraph 8 of the memorandum said an order was sought:

> "Extending the time by 4 months for the applicant to file a charging document under the Health and Safety in Employment Act 1992."

[10] The memorandum was placed before me in chambers and, on 19 September, I made an order, by consent, "in terms of paragraph 8 of the memorandum".

[11] Mr Boraman did not file a charging document within the ensuing four months i.e. by 19 January 2017. That was apparently through "a simple oversight" by his counsel. He did file a charging document within two working days after that deadline, on Tuesday 24 January 2017, the previous day being Wellington Anniversary day. That alleges that Otis failed to take all practicable steps to ensure the safety of its employee Mr Scheib while he was at work; particulars of that alleged failure are included. The charge carries a maximum penalty of a fine not exceeding $250,000.

[12] In Mr Boraman's counsel's memorandum dated 24 January it is acknowledged that the period of extension expired on 19 January 2017 and leave is now sought to file the document those few days out of time.

[13] Otis opposes the application. Its primary submission is that there is no jurisdiction for the Court to grant this application as it was made after the proceeding had already concluded on the expiry of the four-month period on 19 January 2017.

[14] In this judgment I will consider the respective submissions and decide whether or not there is jurisdiction to deal with the application and, if so, whether it should be exercised in favour of Mr Boraman so that the case may proceed.

Submissions

[15] Mr Beck for Mr Boraman first submitted that when I granted the extension by consent on 19 September I did not fix a specific end date, rather it was for "four months". While it is literally true that no end date was specified the end date was readily ascertainable and I see no material difference between my having set a period of four months as opposed to one with a specified an end date of 19 January 2017.

[16] Mr Beck notes that the Court at one stage set the case down for revisiting on 30 January and that the earlier direction can therefore be seen as requiring the

charging document to be filed before that date. I reject this submission. Four months simply means four months. The Court only allocated the subsequent date on the assumption that Mr Boraman would file a charging document within the four month period.

[17] Mr Beck further submitted that the fact that the end date of the four-month period had not been expressly specified amounted to an error or omission in the direction which could be corrected under s 13 of the Interpretation Act 1999. Section 13 provides:

> "The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once".

[18] In my view there was neither error nor omission in the earlier exercise of the power. There is nothing ambiguous about the four months specified and I note indeed that that was the order sought by both parties. I also note (as mentioned in [12] above) that in Ms Armstrong's memorandum dated 24 January it is acknowledged that the period of extension expired on 19 January 2017. In my view that concession was correctly made.

[19] Mr Beck next submits that the Court has continuing power to exercise the jurisdiction as to extension. He notes, correctly, that the time limit which has been exceeded in this case was not one imposed by statute but rather by the Court. Mr Beck submits that s 16 of the Interpretation Act 1999 provides confirmation that a power maybe exercised more than once:

> "(1) A power inferred by an enactment maybe exercised from time to time.
>
> (2) A duty or function imposed by an enactment maybe performed from time to time."

[20] He submits that the Court did not cease to be involved once the directions were given on 19 September. It was envisaged the case would come back before the Court, as evidenced by the allocation of the 30 January date. He submits because the Court remained seised of the matter, it has the power to amend or modify the

directions made on 19 September and to make supplementary orders to deal with matters as they arise. More particularly in the circumstances which have arisen the Court has power he submits to amend the time period specified in the original direction and the power to make further directions. He noted that the order made by the Court on 19 September was in the nature of ancillary or interlocutory order and it was therefore entirely appropriate that the Court retain control of the matter and make further orders as required.

[21] Mr Beck went on to make submissions as to why the Court's jurisdiction should be exercised in favour of Mr Boraman. He refers to the remedial nature of the s 54C provision, the interests of justice generally, the absence of any possible prejudice to the proposed defendant, the very brief delay and the fact that on 13 January Ms Armstrong had confirmed to the proposed defendant that she had instructions to file a charging document so the proposed defendant was kept informed. He adds that there is a strong public interest in holding this defendant to account which would not be served by rigidly applying time limits.

[22] Finally, Mr Beck submits that it is relevant that the charging document has been accepted for filing by the Court. I reject that submission. It would have been received purely administratively by the Court without knowledge of the jurisdictional challenge. If it is correct that there was no jurisdiction for the document to be filed because the case had already concluded on 19 January, as Otis contends, then the fact that it was later accepted for filing cannot create such jurisdiction.

[23] In response, in the event that it were determined there was jurisdiction to grant the application, Mr Gallaway for Otis submitted it should not be exercised. I would, in the event that there is jurisdiction, have no hesitation in exercising it in favour of Mr Boraman for the reasons outlined by Mr Beck, particularly the very short delay and the absence of any possible prejudice arising from that delay. However, the key question and the fundamental issue raised by Otis is whether there is any jurisdiction to consider the application on its merits.

[24] As to this, Mr Gallaway submits that there is a straightforward and insurmountable barrier to the application: the case came to an end on 19 January in the absence of any prior application for extension or the filing of a charging document by then. Mr Gallaway submits that there is no provision in the Act which gives the District Court the power to grant leave to an applicant to file a charging document out of time. He also referred me to the Court of Appeal's observations about the breadth of the District Courts jurisdiction in *Attorney-General v Otahuhu District Court*[2]:

> "As a statutory Court of limited jurisdiction the District Court does not have an inherent jurisdiction to make an order necessary to enable it to act effectively as does the High Court. It is well settled, however, that as ancillary to its particular jurisdiction it has the powers necessary to enable it to act effectively within that jurisdiction. The most important of these inherent powers are the powers of the Court, subject to the rules of Court and to statute, to regulate its own procedure, to ensure fairness in investigative and trial procedures, and to prevent an abuse of process."

[25] On this basis Mr Gallaway submits that the Court does not have inherent jurisdiction to extend the time for filing a charging document when the time has already expired and there are therefore no inherent powers which would empower the Court to do what Mr Boraman asks.

[26] Mr Gallaway referred me to *O'Rourke v Westmoreland Box Co Limited*[3] where the High Court upheld the decision of a District Court to dismiss an information laid two days after the expiry of the relevant six-month time limit. The information was held to be a nullity.

[27] Further, and in the health and safety context, Mr Gallaway noted *Diveco Limited v The District Court at Auckland and the Department of Labour*[4] where the Court said at [35]:

> "… [T]he time limit for laying information …. is so fundamental to the structure of the [summary proceedings] Act that it cannot be overridden by ancillary powers which by implication vest in the District Court."

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[2] [2001] 3 NZLR 740 at 746
[3] High Court Auckland AP 146/87, 30November 1987
[4] High Court Auckland M327-SW02, 20 June 2002

[28] Mr Gallaway submitted that the Court could have exercised any inherent powers it has while the matter was still alive and within its jurisdiction but that any such powers were extinguished once the case concluded. A failure to bring the charging document within the four-month extended time period brings the applicant's proceeding to an end. The District Court does not have the power to reinstate the proceedings where they are no longer within the bounds of its jurisdiction.

Discussion and Decision

[29] The starting point for consideration of the jurisdiction issue which arises must be s 54C itself. I note that subs (2) gives the Court a broad power to extend the time for a private prosecutor to file a charging document. Provided there is an application for extension made within one month after receiving notice from WorkSafe that it will not take enforcement action, the Court's power to extend is on its face an unlimited one, although no doubt the exercise of the Court's power would be informed by the extent to which time is sought beyond the six months, the interests of the efficient dispatch of Court business and more importantly the interests of the proposed defendant.

[30] However, despite the breadth of the power of extension, an application for its exercise may only be made within one month after receiving the relevant notice from WorkSafe. There is no ability to consider an application made after that month. So in this case if Mr Boraman had applied on say 21 August then no matter how good a reason he had for doing so late and no matter how meritorious the proposed prosecution, the case could not have proceeded. There is therefore an unusual juxtaposition of an unalterable deadline and a broad discretion available if you do meet it.

[31] There is no suggestion that there may only be one application within the month. Accordingly, while it would be unlikely to arise, if an applicant successfully made an application for extension but decided, still within the month in question, that more time would be needed then on the face of it there is nothing to stop a further such application being made, and granted. What is clear however is that

there is no possibility at all of any application being made after the expiry of that month.

[32] Significantly for present purposes, given that this is the section which expressly deals with extension of time in these circumstances, there is no suggestion that the Court's power to extend time may be exercised more than once or that, having been exercised, its exercise may be revisited in respect of the time allowed. On the face of s 54C then, if an applicant makes an application within the statutory month (and is not intending or expecting to make a further one within that month) he or she must realise that the extension sought will be a "once only" extension with no possibility of amendment of the extension order. It would have been very easy for Parliament to have provided that the Court, having extended time, was empowered to extend it further but that has not been done.

[33] I therefore accept Mr Gallaway's submission that there is no power in the Act for the Court to grant this application. If there is power to do so, then it must reside elsewhere.

[34] Mr Gallaway, as I understand his submissions, accepted that if there had been an application prior to 19 January 2017 to extend time then the Court's inherent powers may have permitted the granting of such an application. Of course that is not the situation here and, even assuming that is right, the key question is what power does the Court have, once the period of extension has already expired, to grant an application made after expiry for more time?

[35] I do not accept Mr Beck's submission that s 16 of the Interpretation Act 1999 may avail Mr Boraman. The general provision to the effect that the power conferred by an enactment maybe exercised from time to time cannot override the clear restrictions imposed by s 54C(3). The Court is expressly given (a wide) power to extend time but only on a strict condition – that any such application must be made within one month after receiving the relevant notice from WorkSafe. There is no power to extend that one month period. Accordingly because the application dated 24 January 2017 was made well after the expiry of that one-month period there is simply no power, under the statutory regime Parliament enacted to apply to these

circumstances for the Court to grant this application. In the absence of s 54C(3) Mr Boraman may well have had a good argument that the power under s 54C(2) is in light of s 16 of the Interpretation Act 1999 able to be exercised from time to time, but s 54C(3) cannot be ignored.

[36] In short, in relation to the argument under s 16 of the Interpretation Act 1999, the general must give way to the specific. Effectively, on a matter arising in this context Parliament has said that the power to extend time may not be exercised from time to time but rather only on an application made under s 54C(2), which must meet the strict condition in s 54C(3).

[37] As I understood him, Mr Beck was arguing that once the power of extension was exercised then there was power to exercise it again from time to time. If so, again the statutory wording clearly does not permit this. I acknowledge the distinction in principle between a statutory time limit and one imposed by a Judge under s 54C(2), but in the end once a time limit has expired, whatever its provenance, it has expired.

[38] I do not accept the submission that after 19 January the Court was still seised of the matter and accordingly had the power to amend or modify its earlier directions or to make supplementary orders. That might have been correct had an application been made before 19 January but once that date passed the Court was no longer seised of the matter.

[39] Following the hearing, by Minute of 8 February 2017, after reflecting on the jurisdictional issue it seemed to me that Rule 1.7 of the Criminal Procedure Rules 2012 may avail Mr Boraman in this situation. That rule provides:

> **"1.7 Extending and shortening time**
>
> (1) The court may, at any time, extend a time set by or under these rules for doing anything in a proceeding.
>
> (2) If a time set by or under these rules for doing anything in a proceeding has not ended, the court may shorten the time.
>
> (3) A Registrar may exercise the power of the court under this rule if both the prosecutor and the defendant consent.

(4) In this rule, **time set by or under these rules** includes—

(a) a period expressed in working days:

(b) a period expressed by reference to 1 or more events (for example, if certain action is required to be taken before trial callover)."

[40] I noted that from 1 July 2013 the Health and Safety in Employment Act 1992 was amended to take into account the enactment of the Criminal Procedure Act 2011 and that s 54B was amended to provide that its limitation provision applied notwithstanding anything to the contrary in s 25 of the Criminal Procedure Act. On this basis it might be said that although s 25 was overridden by s 54B (to which ss 54C and 54D are subject), by inference the balance of the Act and by further inference its Rules would otherwise apply to prosecution under the Act.

[41] On that basis, on the face of r 1.7, the decision I made on 19 September 2016, although empowered by and made under s 54C(2) of the Act might also properly be seen as one made "under these rules" for the purposes of r 1.7(1). If that were right, then granting the present application to extend the time set on 19 September from four months to the date of actual filing on 24 January would appear to be within the Court's (unlimited) jurisdiction and discretion under r 1.7.

[42] I also noted that although as yet, prior to the filing of a charging document (i.e. one filed with undisputed jurisdiction to do so) there is no proceeding under the Criminal Procedure Act, clearly there are aspects of that Act and indeed the Rules which deal with issues that must be addressed before a charging document is filed. For example, s 24 dealing with how the Attorney-General's consent to a prosecution was to be provided to the Court and s 26 dealing with whether or not a private prosecutor's charging document ought to be accepted by a Registrar or referred to a judge) . Accordingly, by inference, it might be said that the Criminal Procedure Act and the Rules both encompass some pre-proceeding issues and that accordingly r 1.7 may have application in the present circumstances.

[43] Because this was a matter not raised an argument I invited further submissions from counsel and duly received these. Mr Beck submits that the Criminal Procedure Act and the Criminal Procedure Rules are the default provisions

governing all criminal proceedings. While there are specific provisions in the Health and Safety in Employment Act that overrides some of those provisions, they do not provide a comprehensive system for dealing with prosecutions. The general provisions of the Act and the Rules must accordingly remain of application except where they have been specifically modified.

[44] Mr Beck noted r 1.5 of the Criminal Procedure Rules which provides:

> **"1.5 Application of these rules**
>
> (1) These rules apply—
>
> (a) to proceedings to which the Act applies in a District Court or the High Court; and
>
> (b) to related and incidental matters.
>
> (2) If these rules do not make provision or sufficient provision for a matter that arises in a proceeding, the court may give any directions or rulings about the matter that the court considers appropriate in the interests of justice.
>
> (3) The rules are subject to any other enactment to the contrary."

[45] Mr Beck noted, as I had, that the Criminal Procedure Act regulates generally the conduct of criminal proceedings in the District Court and is of application both as to the commencement and continuation of such proceedings. Given the absence of specific regulation dealing with the present situation (and the absence of any case authority) Mr Beck submitted that the direction made on 19 September could be seen as falling under r 1.5(2). Consequently he submitted that r 1.7 allowed the Court to extend its direction of 19 September which, while not set *by* the Rules, was nevertheless properly seen as having been made *under* the Rules.

[46] Mr Gallaway submitted that r 1.7 had no application to the present situation. He described the time limits set out in ss 54B and 54C of the Health and Safety in Employment Act 1992 as being absolute. The jurisdiction to grant the extension of time which Mr Boraman successfully obtained arose under that Act, not under the Criminal Procedure Act or the Rules. He also noted that s 14 of the Criminal Procedure Act prescribes that a criminal proceeding is commenced by filing a charging document in the District Court. Until that point, he submitted that there

was no proceeding in respect in which that Act applied. In the event that a charging document has not been filed, as was the case here as at 19 January, that Act simply did not apply. Therefore the Rules cannot and do not apply and the Court was not being asked to extend a time "set by or under the Rules".

[47] Having reflected on the relevant provisions of both the Act and the Rules and on the submissions, I am satisfied that r 1.7 is of no assistance to Mr Boraman here. Although clearly there are respects in which both the Criminal Procedure Act and Rules address pre-proceeding matters, s 14(1) is a critical provision for present purposes. It provides:

> "A criminal proceeding in respect of an offence is commenced by filing a charging document in the District Court…".

[48] Self-evidently, prior to the filing of a charging document there is no "criminal proceeding". That does not mean that the Act and its Rules do not address certain issues which may arise prior to the coming into existence of a criminal proceeding. However r 1.7(1), which I repeat here, provides:

> "The Court may, at any time, extend a time set by or under these rules for doing anything *in a proceeding*" (emphasis added)

[49] The combination of s 14 and r 1.7 makes it clear that the direction I made on 19 September 2016 was not one about doing anything "in a proceeding" because there was at that point no proceeding as defined by s 14.

[50] Accordingly the power to extend time provided in r 1.7(1), very wide though it is in connection with any time which has been set by or under the Rules after a proceeding has commenced, has no application prior to the filing of a charging document. While of course a charging document has been filed here, I have already held that was done without jurisdiction.

[51] Further, although it is not necessary to determine this, I am also in any event inclined accept Mr Gallaway's submission that the power I exercised on 19 September was one arising under the Act, and that it is not properly seen as also having been exercised under the Criminal Procedure Act or Rules. While I accept Mr

Beck's point that the latter are the default provisions governing criminal proceedings, this was not a situation for resort to the default provisions; rather the Act expressly sets out in s 54C what may and may not happen in this context. I do not see that rules 1.5 or 1.7 may apply in a situation governed expressly by s 54C. If they did, there would be nothing to stop the Court exercising the power under s 54C(2) repeatedly, indeed doing so without reference to the restriction in s 54C(3). Again, the general must give way to the specific, and to procedural rules to an Act.

Conclusion

[52] For these reasons I uphold Otis' jurisdictional challenge and direct the Court to reject the charging document filed and indeed the application made in Ms Armstrong's memorandum of 24 January. I conclude the Court had no power to accept the charging document on 24 January, or at any time after 19 January, and that the Court has no power either to deal with the application made in Ms Armstrong's memorandum of 24 January. Both the charging document and application are nullities.

[53] As no submissions were made on the issue of costs I reserve these in case Otis wishes to make an application. Any such application is to be filed and served with supporting submissions within 21 days of the date of this judgment with Mr Boraman having 21 days to respond.

S M Harrop
District Court Judge