IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2023] NZDC 10648

WORKSAFE NEW ZEALAND
Prosecutor

v

ANDREW BUTTLE
JAMES BUTTLE
PETER BUTTLE
Defendants

Date of hearing:	30 May 2023
Appearances:	K McDonald KC, M Hodge and S Symon for the Prosecutor D Neutze and P Hawkin for the Defendants
Judgment:	30 May 2023

ORAL RULING OF JUDGE E M THOMAS
[S147 applications]

The applications under s147 Criminal Procedure Act 2011 are dismissed.

REASONS

Introduction

[1] Under the Health and Safety at Work Act 2015, directors can be prosecuted for failing to exercise due diligence in ensuring PCBUs meet their obligations under the Act. Although the PCBU itself would be liable, there can be a public interest, and usually is, in holding directors to account personally where they may be liable.

[2] It is also fundamental that a defendant can receive a fair trial. Critical to that is having fair notice of what the case is against them. In October last year, Andrew, Peter and James Buttle applied to have the charges against them dismissed. They did so on the basis that the charges did not adequately particularise the case against each of them.

[3] I ruled on that application in favour of WorkSafe (the October ruling). I did so on the basis that I understood WorkSafe's case to be that the Buttles took no steps at all, so that no further particulars were required. That if WorkSafe's case was the Buttles took some but insufficient steps, those steps would need to have been particularised. WorkSafe maintains that it did not intend to convey that impression. That its case is the Buttles, while taking some steps, did not take enough to constitute due diligence.

This application

[4] The Buttles argue that this offends against the October ruling. That if this is WorkSafe's position, the failure to particularise it in the charging documents does not enable a fair trial. The Buttles say that continuing the proceedings then amounts to an abuse of process and they apply to dismiss the charges that they face. Alternatively, they say that the charges should be dismissed because there is no case to answer. WorkSafe opposes all three applications in their entirety.

Abuse of process

[5] I must be satisfied that there has been an abuse of process before I could dismiss a charge. State misconduct can amount to an abuse of process. It would do so where it either prejudices the right of the defendant to have a fair trial or it

undermines public confidence in the integrity of the judicial process if a trial is permitted to proceed. I must weigh the public interest in maintaining the integrity of the justice system against the public interest in having those accused of offending stand trial. Dismissing a charge for abuse of process is an extreme step, however, to be taken only in the rarest of cases.[1]

Would continuing the proceedings against the Buttles be an abuse of process?

[6] No.

[7] WorkSafe maintains the Buttles have been well aware of the case against them for some time. That it is all set out in granular detail in the evidence of Mr Gibson. That this brief was disclosed early enough to not prejudice the Buttles' ability to defend the charges. There is force in that argument. Usually, it would be a winning argument in cases where there is no statutory period within which to provide the necessary information.

[8] However, Parliament has set a statutory period for the filing of charging documents under the Health and Safety at Work Act. That period is 12 months from the date WorkSafe becomes aware of any possible breach of the Act. In the context of this case, that means effectively WorkSafe had 12 months from the date of the eruption. Binding authorities such as *Talley's Group Ltd v Worksafe New Zealand* requires those charging documents to sufficiently particularise the breach.[2] As I have previously ruled, if WorkSafe wish to argue that the Buttles having taken some steps failed to take others, it needed to particularise those others.

[9] This application is not an opportunity for either party to relitigate what was already covered in the October ruling. What is clear from that ruling is that I only ruled in WorkSafe's favour because I understood its case to be that the Buttles did nothing. That WorkSafe did not need to distinguish between steps taken and not taken and identify what reasonable steps were not taken because it said no steps were taken at all.

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[1] *Wilson v R* [2015] NZSC 189.
[2] *Talley's Group Ltd v Worksafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198.

[10] Parliament has not allowed for exceptions to the 12-month timeframe that would assist WorkSafe in this case. Permitting WorkSafe's case to go ahead in the way it intends would require us to ignore Parliament's intention in setting the 12-month requirement and binding court authority on the provision of particulars at an early stage. These are key fundamentals of our justice system. I cannot ignore them. The public interest in trying the Buttles does not outweigh the need to preserve the integrity of the justice system.

[11] So, in all but one respect, I would have found an abuse of process. That is not to say that WorkSafe has acted in bad faith. No evidence establishes that. Its failure was in not particularising enough early enough. That was perhaps always going to be challenging with an investigation of this nature, size, and complexity.

[12] The Buttles' application, however, fails in one respect. Particular (c) in respect of each of them alleges that the defendant concerned failed to take reasonable steps to ensure that the PCBU had available for use and used appropriate resources to eliminate or minimise risks to health and safety from the PCBU permitting access to Whakaari. There are no further particulars in the charging documents. That failure would appear to offend against the *Talley's* decision. However, at paragraph 3.11 of the summary of facts dated 8 December 2020, WorkSafe sets out that the Buttles "[failed to obtain] expert advice on how WML could ensure that guided tours at Whakaari were conducted safely". That reference fully informs the Buttles of everything they need to know about this allegation.

[13] The Buttles argue that relying on the summary of facts is not best practice as per the *Talley's* decision. It draws to my attention that WorkSafe recognised that and undertook during those proceedings that it would not rely upon that practice in future cases. The Buttles, therefore, have a fair complaint that WorkSafe now seeks to do so. WorkSafe's attempt to do so could amount to an abuse of process, but only if it affects the integrity of the justice system to such an extent that it outweighs the public interest in trying these allegations. It does not. The summary of facts was made available to the defendants at the same time as the charging documents, so there is no prejudice in that respect. I do, however, endorse the comments of the Court in *Talley's* that that is not the way it should be done.

[14] The Buttles argue that even restricting the charge to this limited extent, however, causes prejudice to a fair trial that cannot be remedied. Since the October ruling, the Buttles have relied upon WorkSafe's case being that they took no steps at all. They have prepared a defence on that basis. They claim that the position taken by WorkSafe today represents a shift in the case against them. I agree that it can be taken that way. They argue that they cannot now get a fair trial because there would be insufficient time within which to instruct an expert.

[15] However:

(a) they were aware from the beginning of this prosecution until October last year that this was an allegation against them. While they are, of course, entitled to pursue s 147 applications, prudence would also demand that they would have been preparing for the possibility of trial at the same time.

(b) WML, the PCBU of which they are directors, faces the same allegation. It is also represented by Mr Neutze. It was not the subject of the October ruling. There has never been any issue about the particulars of the charge or charges it faces. In other words, it should always have been preparing to meet this allegation, at the same time enabling the Buttles to meet this allegation.

Is there a case to answer?

[16] The Buttles initially argued in respect of the original charges that there was insufficient evidence upon which a fact finder could reasonably convict. They maintain that application. However, they accept that WorkSafe has evidence:

(a) Andrew Buttle was actively involved in managing the operation of WML during the charge period,

(b) all three were directors of WML and, therefore, should have been aware of WML's activity,

(c) prior to the charge period, WML had been put on notice by GNS that it should at least consider getting expert advice, and

(d) WML did not get expert advice.

[17] That evidence is sufficient to amount to a case to answer.

Result

[18] The Buttles' applications are, therefore, dismissed.

[19] However, they were nearly successful. WorkSafe is now limited to only particular (c) and only to the allegation that the Buttles failed to obtain expert advice on how WML could ensure that guided tours of Whakaari were conducted safely.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 02/06/2023