IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2022-409-000022
[2022] NZHC 1042

BETWEEN	SOUTHERN PALLET RECYCLING LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 15 March 2022

Appearances: T Mackenzie for Appellant
T G Bain and V Veikune for Respondent

Judgment: 13 May 2022

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 13 May 2022 at 3.15 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……………

Introduction

[1] The appellant, Southern Pallet Recycling Limited (Southern Pallet), is charged with failing to comply with its duty to ensure, so far as reasonably practicable, the health and safety of its workers and, in particular, to ensure that a HolyTek Cut-Off Saw was safe to use.[1] Southern Pallet applied for the charge to be dismissed which was declined by Judge Brandts-Giesen on 10 September 2020.[2] It appeals that decision.

Background

[2] Southern Pallett is a company based in Christchurch specialising in the manufacture of pallets and bins. It also supplies recycled pallets and carries out pallet servicing and repairs. Mr Gugich was employed by the appellant as a timber handler at their Christchurch manufacturing plant.

[3] On the morning of 15 February 2019, Mr Gugich was working on a HolyTek Cut-Off Saw located in a container away from the main warehouse. This saw is a "rise and fall" saw, which means, when activated, a circular cutting blade ascends to cut wood at a desired length then descends again. Lengths of timber are fed into the side of the saw by the person operating the saw.

[4] Mr Gugich was the saw's primary operator and had used it regularly since commencing employment with Southern Pallet. He was asked by his supervisor to trim 20 mm off a number of small boards that were 90 mm wide and 19 mm thick. The saw was not set up to cut the smaller boards. Mr Gugich was clearing debris away from the right side of the saw with his right hand whilst at the same time stacking the cut pieces with his left. He reached through the guarded "danger area" to clear the debris. He did not use the pressurised air hose mounted on the wall nearby which he had been trained to use to clear debris.

[5] As he stacked some cut pieces, he pivoted on his left foot and activated the foot pedal which initiated the cutting action of the saw blade. His right hand was still in

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1 Under ss 36(1)(a), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015.

2 *WorkSafe New Zealand v Southern Pellet Recycling Limited* [2020] NZDC 18221.

the danger area, and the saw blade cut completely through his hand at the wrist. Within seconds he received first aid treatment and fortunately his hand was successfully re-attached on the following day.

[6] WorkSafe New Zealand (WorkSafe) was immediately notified of the incident by Southern Pallet and began an investigation. That investigation concluded the saw was not safe for use. It was not effectively guarded and had a range of design faults. Key findings included:

(a) the tunnel guards were too short, and the openings too large, to sufficiently restrict access to the saw blade;

(b) the movable guard was ineffective as the operator could gain access to the saw blade without lifting the guard high enough to trigger the interlock limit switch; and

(c) the machine had a foot pedal control that allowed the full cutting sequence to run with a single press, rather than having a two handed "hold to run" control which would make it hard for an operator to circumvent the guards since both hands are required to be away from the blade to initiate the machine cycle.

[7] Furthermore, Southern Pallet had modified the saw after purchase, but it did not seek or obtain assistance from a qualified competent person experienced at working with and using the leading standard for machine guarding, AS/NZ 4024. When it modified the saw it allowed the saw to be operated from both sides not just the left side as the manufacturer intended to mitigate the risk of harm to workers.

[8] WorkSafe charged Southern Pallet asserting that it had a duty to ensure, so far as was reasonably practicable, the health and safety of its workers and failed to comply with that duty by failing to ensure the saw was safe to use. That failure exposed Mr Gugich to a risk of serious injury.

[9] When applying for dismissal of the charge, Southern Pallet sought to rely on a 21 November 2017 inspection by a WorkSafe inspector, Mr Maru, which had a focus on machinery guarding. Prior to his visit, Mr Maru sent an email to Southern Pallet stating:

> … we will have a look around the work place and if there are any issues that need addressing then we will discuss them and take the appropriate actions.

Following the inspection, Mr Maru emailed the appellant with a summary of his findings. In it he stated: "Machinery in place are guarded well which was my primary focus for the visit …".

[10] Southern Pallet says its error in having an unsafe machine was induced by WorkSafe, through Mr Maru, advising it the factory's machines were well guarded and safe after conducting an inspection. The saw was there at the time of the 2017 inspection and had not been modified between the inspection and the accident. In those circumstances Southern Pallet applied for an order dismissing the charge on the grounds it was an abuse of process for WorkSafe to pursue it.

Principles on appeal

[11] Section 232 of the Criminal Procedure Act 2011 (CPA) provides that the Court may only allow an appeal against conviction if satisfied that the trial judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred", or that "a miscarriage of justice has occurred for any reason." A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[3] In this section, a trial includes a proceeding in which the appellant pleaded guilty.[4]

[12] Southern Pallet says the Judge's decision led to a miscarriage of justice because, in practical terms, it forced that company to plead guilty to a charge which should have been dismissed as an abuse of process.

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3 Criminal Procedure Act 2011, s 232(4).
4 Section 232(5).

The District Court decision

[13] Judge Brandts-Giesen heard Southern Pallet's application to dismiss the charge under s 147 of the Criminal Procedure Act 2011 (CPA) on 6 August 2020. The hearing proceeded with Mr Maru and Southern Pallet's director, Mr Donnithorne, confirming their affidavit evidence and being cross-examined on it, before legal submissions were heard on whether the circumstances of the WorkSafe inspection comprised grounds for dismissing the charge.

[14] In his decision dated 10 September 2020, the Judge first set out the evidence. He noted Mr Donnithorne's assurances that his company was committed to safety for the sake of its staff and also to avoid penalties that follow a breach. The Judge also noted Southern Pallet had had only one notifiable offence in 12 years of operation and engaged an independent safety company to audit its systems once a year.

[15] An issue that arose was whether Mr Maru inspected the saw during his visit. Mr Donnithorne could not confirm the saw had been inspected, although he said Mr Maru's inspection was comprehensive and he must have seen it during the inspection. Mr Maru's evidence was that he could not recall seeing the saw and did not inspect it. Mr Maru said if he had inspected it, he would have noted that he had done so. The Judge also noted Mr Donnithorne's admission that the modification of the saw, so it could be used from either side, had not been drawn to Mr Maru's inspection or to the attention of the company's independent safety consultant.

[16] The Judge considered it was unreasonable for Mr Donnithorne to assume Mr Maru had tested every piece of equipment, especially considering the saw might not have been operated by a staff member when Mr Maru was there. The Judge noted Mr Donnithorne was unfamiliar with the WorkSafe website and had not ensured every piece of equipment had been tested professionally.

[17] The Judge set out s 147 of the CPA and confirmed that a stay will be granted where it is shown the prosecution is an abuse of process.[5] He accepted that s 147 was "somewhat open-ended" in that it permitted a dismissal on certain grounds but did not

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5 At [21].

provide an exhaustive list. The Judge considered, because WorkSafe is a multifunctional agency, including educational, supportive and consulting purposes, the bar for finding an abuse of process or unfair conduct may be reached more easily than where there is a purely prosecutorial agency.

[18] The Judge did not view officially-induced error of law as a cause of action or defence in its own right, but rather, "an illustration of various possible fact scenarios which show that there has been an abuse of process, a misuse of investigatory powers, or unfair or unconscionable conduct".[6] Referring to *Fox v Attorney-General*, the Judge found, for such an application to succeed, the applicant would have to prove the acts of the prosecuting agency were sufficiently egregious to conclude proceeding with the prosecution would tarnish the Court's integrity or offend the Court's sense of justice and propriety.[7] The Judge did not find that to be the case here, instead observing the general public may feel justice had not been done "if an injury as serious as a severed hand were to be swept under the judicial carpet".[8] For that reason, he declined the application.

Issues

[19] The following issues are raised by the parties in submissions on this appeal:

(a) whether the appeal ought to be heard prior to sentencing;

(b) whether the appellant can appeal its convictions after entering guilty pleas;

(c) whether a doctrine of officially-induced error of law is, or should be, recognised in New Zealand;

(d) whether the Judge made an error or errors of law in applying the orthodox test for stay of proceedings; and

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6 At [29].
7 *Fox v Attorney-General* [2002] 3 NZLR 62.
8 At [31].

(e) whether there were grounds for a stay of proceedings and whether there was a miscarriage of justice generally.

Should the appeal be heard prior to sentencing?

[20] Mr Mackenzie, for Southern Pallet, acknowledged the default position is that a defendant may appeal their conviction after they have been sentenced. However, he submitted sentencing in this case will be a significant exercise involving comprehensive submissions on culpability, parallel inquiries into reparation and evidence as to financial capacity. Further, Mr Mackenzie noted WorkSafe's argument as to officially induced error was that it related to sentencing. If sentencing were to proceed prior to the hearing of this appeal, it seems it would be on that basis. There is an obvious expediency in having the issues relating to officially induced error determined so, at sentencing, they can be applied in light of the determination. There is a similar expediency in determining the issue prior to sentencing so that, if the appeal is successful, the significant undertaking which sentencing could comprise can be avoided.

[21] WorkSafe does not take issue with the appeal being heard prior to sentencing, submitting the effect of COVID-19 on the District Court means there is likely to be significant delay in reaching a sentencing hearing in any event.

[22] In these circumstances, I am satisfied it is appropriate that the appeal be heard now.

Can Southern Pallet appeal its conviction after a guilty plea?

[23] The Court of Appeal has stated an appeal against conviction following a guilty plea will only be entertained in exceptional circumstances. The appellant will need to show a miscarriage of justice will result if the conviction is not overturned.[9] The Court has identified three situations where a miscarriage may result:[10]

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9 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16] cited with approval in *Richmond v R* [2016] NZCA 41 at [16]; and *Nixon v R* [2016] NZCA 589, (2016) 28 CRNZ 698 at [8].

10 At [17]-[19].

(a) The appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge.

(b) On the admitted facts the appellant could not in law have been convicted of the offence charged.

(c) The plea was induced by a ruling which embodied a wrong decision on a question of law.

[24] The third category is the relevant category here. Under that category the Court of Appeal distinguished admissibility decisions from decisions that are more determinative of a defendant's position such as a decision removing a defendant's single defence.[11] In the case of an erroneous pre-trial decision, it is not enough that the defence case has suffered a "body blow". Instead, all defences must be removed.[12]

[25] The Supreme Court in *Wilson v R* found the summary above was incomplete as it did not recognise the possibility a conviction following a guilty plea may be quashed where there is an abuse of process justifying the granting of a stay in order to preserve the integrity of the justice system.[13] Subsequently there has been a further widening of the categories to include circumstances where judicial intervention inappropriately prompted a guilty plea.[14]

[26] Mr Mackenzie submitted Southern Pallet's failures in relation to the saw were clear. After reviewing dozens of sentencing decisions in machine guard cases, he located only one attempt at a defence.[15] That attempt was unsuccessful.[16] He submitted, accordingly, Southern Pallet's only real chance of avoiding conviction was to seek a stay on the ground of officially-induced error of law. After the Judge's decision, the only option for Southern Pallet was to plead guilty. The case therefore fell within both the third category in *Le Page* and the fourth category in *Wilson*, and it was submitted the conviction following a guilty plea could be revisited on appeal.

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11 At [20].
12 *Banbrook v R* [2013] NZCA 525 at [20].
13 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [104].
14 See *Gleason-Beard v R* [2018] NZCA 349, [2018] 3 NZLR 699 at [22]-[27].
15 *Waimea Sawmillers Limited v WorkSafe New Zealand* [2016] NZHC 915.
16 At [66].

[27] Mr Bain, for WorkSafe, accepted the threshold was met in this case. There was no realistic prospect of Southern Pallet being acquitted at trial, and its only opportunity to avoid liability was the stay application. When that application was declined, the only option was to appeal that decision. There was no scope for defending the matter at trial.

[28] I consider counsel's analysis and Mr Bain's responsible concession appropriate here. The fact the appeal arises after the appellant's guilty plea should not in this case, be a barrier to the appeal being heard on its merits. If the Judge's ruling was wrong and the charge should have been dismissed there would have been no guilty plea and a miscarriage of justice would have resulted.

Is, or should a doctrine of officially-induced error of law be recognised in New Zealand

[29] Both counsel made thorough submissions on the issue of whether the doctrine of officially-induced error of law is, or should be, recognised in New Zealand.

[30] Mr Mackenzie referred to an article by Professor Margaret Briggs who described the doctrine as follows:[17]

> An officially-induced error typically arises where a public official or agency with responsibility for interpreting, administering or enforcing a particular law, supplies incorrect or misleading advice or information to a person inquiring about that law. Relying in good faith on the advice, the inquirer breaks the law despite having dutifully attempted to ascertain what it provides. As a matter of individual fairness it seems unduly harsh, churlish even, for the state then to hold that person to account for the mistake it induced. The integrity of the criminal justice system is potentially undermined when proceedings are taken against a defendant in such circumstances.

Although her article suggested the doctrine was most appropriately engaged by entitling the defendant to a stay of proceedings (which is what is sought here), both counsel addressed the court on the extent to which it was recognised as a defence in overseas proceedings, presumably because those decisions identify what is required to establish officially-induced error such as would warrant the grant of a stay.

[17] Margaret Briggs "Officially-induced error of law" (2009) NZLJ 166 at 166.

[31] Mr Mackenzie submitted the most commonly applied decision is that of the Canadian Supreme Court in *R v Jorgenson* and referred to the dissenting judgment of Lamer CJ in that case setting out a six-step test for application of the doctrine.[18] That test was subsequently approved by the Canadian Supreme Court without dissent in *Lévis (City) v Tétrault; Lévis (City)*:[19]

> 26 After his analysis of the case law, Lamer C.J. defined the constituent elements of the defence and the conditions under which it will be available. In his view, the accused must prove six elements:
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> (1) that an error of law or of mixed law and fact was made;
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> (2) that the person who committed the act considered the legal consequences of his or her actions;
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> (3) that the advice obtained came from an appropriate official;
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> (4) that the advice was reasonable;
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> (5) that the advice was erroneous; and
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> (6) that the person relied on the advice in committing the act.
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> …
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> 27 Although the court did not rule on this issue in *Jorgensen*, I believe that this analytical framework has become established. Provincial appellate courts have followed this approach to consider and apply the defence of officially induced error … I would also note that, in this appeal, neither the prosecution nor the intervener, the Attorney General of Canada, has questioned the existence of this defence in Canadian criminal law as it presently stands …

Mr Mackenzie also submitted the doctrine has recently been recognised in Ireland as a matter to be raised pre-trial, as here, rather than as a substantive defence at trial.[20]

[32] Mr Bain accepted the appellant's summary of the Canadian position. As for the situation outside of Canada, Mr Bain submitted the defence has been rejected in both Australia[21] and the United Kingdom,[22] which Mr Mackenzie acknowledged.

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18 *R v Jorgensen* [1995] 4 S.C.R. 55 at [28]-[36].
19 *Lévis (City) v Tétrault; Lévis (City)* [2006] 1 S.C.R. 420.
20 *Director of Public Prosecutions v Casey* [2019] IESC 7.
21 *Ostrowski v Palmer* [2004] HCA 30, [2004] 5 LRC 664.
22 *Surrey County Council v Battersby* [1965] 2 QB 194 (DC); [1965] 1 All ER 273 and C*ambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426, [1972] 3 All ER 232 (DC).

Mr Bain did, however, acknowledge that the doctrine will be accounted for at sentencing in the United Kingdom. The same appears true in Australia.[23]

[33] There was more disagreement as to the New Zealand position. Mr Bain submitted the authorities are clear the doctrine is limited to being a sentencing matter. Mr Mackenzie submitted the position is not as clear-cut, but accepted the Canadian position has never been expressly approved.

[34] Both counsel referred to *Crafar v Waikato Regional Council*,[24] so I take that case as the starting point. It is convenient to refer to Andrews J's summary of the position.

> [115] Having reviewed the authorities referred to me, I accept Mr Pilditch's submission that the authorities do not establish the existence of a substantive defence of "officially induced error" in New Zealand at this stage. At its highest, all that can be said is that "officially induced error" may support an application for discharge without conviction under s 106 of the Sentencing Act 2002. This being an application made by a person who has either pleaded guilty to, or been found guilty of, a crime, both the legal and evidential burden would rest on the application to establish that a discharge should be granted.

[35] Relying on this excerpt, Mr Bain submitted officially induced error was not a doctrine recognised in New Zealand law and this Court should not adopt it.

[36] However, Mr Mackenzie referred to several subsequent decisions that require comment. In *HBT v Police*, Miller J stated:[25]

> [61] The defence of officially induced mistake of law has been examined in a number of cases, although in non has it yet been adopted in New Zealand law. The authorities were most recently reviewed by Andrews J in [*Crafar*]. I need not repeat that exercise. I am content to assume, without deciding, that the defence exists.
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> [62] The short point is that the defence has no prospect of success on these facts. Its elements were discussed in [*Jorgensen*]. One element is that an appropriate official gave advice about the law that was wrong. Mr Ryan pointed to no such advice in the revocation notice or the manual. The most he could identify was the omission from the revocation notice of any warning that Mr T could not use a firearm under supervision. That cannot possibly be construed as advice that he might lawfully do what the notice did not expressly prohibit, particularly

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[23] *Environment Protection Authority v Fletcher* (2001) 114 LGERA 187 at [116].

[24] *Crafar v Waikato Regional Council* HC Hamilton CRI-2009-419-67, 13 September 2010.

[25] *HBT v Police* HC Palmerston North CRI-2010-454-51, 29 April 2011.

> since the notice did make it clear that he could [no] longer possess firearms. The manual, if Mr T did know of it, shows that the Police believed a defence of supervised use should not succeed.

[37] While Mr Mackenzie submitted Miller J was tacitly acknowledging the doctrine could be a defence, I do not consider Miller J went that far. He simply made a finding that, even if it did exist as a defence, it would not have been available on the facts.

[38] In *Parkes v R*, Collins J found the "accepted position is that [the doctrine] is best treated as a relevant consideration in an application for discharge without conviction".[26] In *Longhurst v Ministry of Social Development*, Cooke J concluded "[t]he status of the defence in New Zealand law is uncertain. It has been considered in a number of cases, but has yet to be successfully applied".[27] Similarly, in *Rowe v R*, the Supreme Court declined to consider the application of the doctrine, saying "it is more appropriately dealt with in another case".[28] In Mr Mackenzie's submission it remains open for the New Zealand Courts to recognise the doctrine in an appropriate case.

[39] However, in my view, much of this debate was irrelevant to the issues that arise in this appeal except insofar as these cases (in particular, the Canadian cases) set out the requirements for establishing an officially-induced error for the purpose of a criminal proceeding. Southern Pallet was not advancing officially-induced error as a defence. Had it done so, it would not have pleaded guilty to the charge but rather proceeded to trial defending the charge on this basis. The real issue is whether, as advanced by Professor Briggs, officially-induced error should be recognised as a grounds for staying a prosecution.

[40] In her article Professor Briggs suggests that the decision in *Lévis* "should not be overlooked from the New Zealand standpoint" as it "offers a workable procedural remedy: rather than an acquittal, officially-induced error entitled to the accused to a

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26 *Parkes v R* [2018] NZHC 2752, [2019] NZAR 1425 at [33] citing *Crafar v Waikato Regional Council*, above n 24 and *Wilson v Auckland City Council* [2006] DCR 655.

27 *Longhurst v Ministry of Social Development* [2019] NZHC 1496 at [33].

28 *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875 at [68].

stay of proceedings on the ground of abuse of process".[29] It also avoids "a head-on collision" with the principle that ignorance of the law is no defence.[30] She endorses Lamer CJC's comparison of officially-induced error to entrapment as both concepts function as "excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor".[31] In both types of cases "the accused has done nothing to entitle him to an acquittal, but the state has done something which disentitles it to a conviction".[32] However, she endorses the statement in *Jorgensen*, that "as a stay can only be entered in the clearest of cases, an officially-induced error of law argument will only be successful in the clearest of cases".[33]

[41] She goes on to point out that the link between officially-induced error and abuse of process was identified in *Ministry of Fisheries v New Zealand Wholesale Seafoods (1984) Ltd*.[34] While not relevant to the decision (which was an application for further disclosure), the Court recorded that:[35]

> … the much wider doctrine of abuse of process amply covers circumstances where the bringing of a prosecution is an abuse of process because of the way in which officialdom dealt with a defendant prior to charging him.

[42] I see no reason why a proceeding could not be stayed under s 147 where, particularly in the regulatory field, an enforcement authority has formally approved or sanctioned the very act which it subsequently seeks to prosecute and where the defendant has reasonably relied on that advice. For example, if an individual sought advice on whether a particular structure needed resource consent and provided all relevant information on the proposal to the local authority (such as plans, distances from the boundaries and the like), and received unequivocal advice that a resource consent was not required, it should be open to the defendant to seek a stay of the prosecution on the grounds of abuse of process.

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29 *Briggs*, above n 17, at 167.
30 At 167, see Crimes Act 1960, s 25.
31 *R v Jorgensen*, above n 18, at [22] and [37].
32 At [37].
33 At [37].
34 *Ministry of Fisheries v New Zealand Wholesale Seafoods (1984) Ltd* [2001] DCR 85.
35 At 26.

[43] However, that example assumes a complete and direct request of the enforcement agency as to whether the activity in question complied with the law, where that agency could reasonably be expected to be authoritative on the legal position because it created the regulatory framework which applies. The real issue in most cases will be whether the official advice was so directly on point as to the legal status of the activity, that it would be an abuse of process to allow the prosecution to proceed, because the defendant was entitled to rely on it. That is the issue which arises in the present case.

Did the Judge err in law in applying the test for stay of proceedings?

[44] Mr Mackenzie submitted the Judge's decision was erroneous in multiple respects. First, he says the Judge erred in law by applying the test in *Fox v Attorney-General* which required the prosecution's acts to be "sufficiently egregious" before a stay would be granted.[36] Mr Mackenzie says because officially-induced error of law should be adopted as a separate basis for a stay, the higher thresholds set out in *Wilson* and *Fox* were not relevant. He maintained there is no need to impose a threshold of "tarnishing the Court's integrity" or import concepts of bad faith or misdconduct. It is simply a question of whether the test for the doctrine is made out.

[45] Mr Bain on the other hand submitted it was appropriate for the Judge to consider whether the settled test for stay of proceedings was met on the facts, and he approached the application on that basis. In that regard, he submitted the Supreme Court in *Wilson v R* set out an exhaustive list of grounds for a stay on the basis of state misconduct which binds this court.[37] The Supreme Court in *Wilson* said:

> [40] In relation to criminal proceedings, a stay may be granted where there is state misconduct that will:
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> (a) prejudice the fairness of a defendant's trial ("the first category"); or

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36 *WorkSafe New Zealand v Southern Pallet Recycling Limited*, above n 2, at [30]; applying *Fox v Attorney-General*, above n 7, at [37].

37 *Wilson v R*, above n 13.

> (b) undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed ("the second category").[38]

[46] Although the Judge only referred to *R v Horseferry Road Magistrates Court ex parte Bennett* and *Fox v Attorney-General*,[39] both cases were cited in *Wilson* and Mr Bain submits the Judge correctly applied the test in *Wilson*.

[47] WorkSafe submits that the second test in *Wilson* is sufficiently broad to cover the ground claimed by officially-induced error and there was no need to lower the threshold. It deliberately set a high threshold for granting a stay of proceedings saying, in second category cases, "the granting of a stay [is] an extreme step … to be taken only in the clearest of cases".[40]

Discussion

[48] While the Judge referred to the test in *Fox v Attorney-General*, he was not suggesting the conduct had to demonstrate bad faith or misconduct. Instead, he was applying the threshold in the second category of *Wilson*, where to proceed with the prosecution would "undermine public confidence in the integrity of the judicial process".[41] I accept WorkSafe's submission that that category is broad enough to capture a case of officially-induced error where a defendant is misled by the prosecuting authority into committing an offence. Indeed, the Judge proceeded on that basis. However, the bar for granting a stay on that basis is properly set high.

[49] I see no error in the Judge's approach to the question of whether the charge should be dismissed. He acknowledged the possibility an offence could be committed relying on official advice that the activity was lawful, and public confidence in the Courts could be undermined if a prosecution proceeded in those circumstances.[42] Given this is the test which was being applied, it was not irrelevant for the Court to

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[38] See, for example, *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13] per Dyson JSC for the majority; *R v Babos* 2014 SCC 16, [2014] 1 SCR 309 at [31], per Moldaver J for the majority; *Fox v Attorney*-General, above n 7, at [37]; *Moti v The Queen* [2011] HCA 50, (2011) 245 CLR 456 at [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[39] *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42 (HL); and *Fox v Attorney-General*, above n 7.

[40] At [50].

[41] At [40].

[42] *WorkSafe New Zealand v Southern Pallet Recycling Limited*, above n 2, at [30].

give consideration to the public's perception of the appropriateness of dismissing the charge, as the Judge did in this case. However, any views I express on whether the Judge adopted the correct test are rendered academic by my conclusions on the next issue.

[50] While Southern Pallet also made other criticisms of the Judge's decision including whether the factual findings took account of irrelevant matters or were plainly wrong, those are better addressed under the next heading insofar as they are relevant to my findings.

Did the conduct meet the threshold for officially-induced error of law justifying a stay of proceedings?

[51] The deciding issue in this case is whether, in the circumstances, the conduct in question met the threshold for an officially-induced error of law. If they do not then, regardless of what test is applied, the appeal must fail.

[52] On this point, the appellant says the six elements set out in *Jorgenson*, and approved in *Lévis*, can be applied as follows:

(a) First, Mr Mackenzie says there was a mistake of law. Southern Pallet considered that the HolyTek saw was compliant with the HSWA. It was not compliant.

(b) Southern Pallet considered the legal consequence of its actions. Mr Donnithorne was aware of the potential for health and safety offences to be committed in Southern Pallet's operation, having already had an accident investigated by WorkSafe, and that awareness drove his request for advice.

(c) The advice was from an appropriate official, being an inspector from WorkSafe, the same entity who then charged the company in respect of the HolyTek saw.

(d) The advice was reasonable. It was on point and directed to the adequacy of the guarding of the machines.

(e) The advice was erroneous as the HolyTek saw was not compliant with standards or guidelines, despite the advice the machinery was "guarded well".

(f) Southern Pallet relied on the advice. Mr Donnithorne specifically requested it in writing and said, had there been any suggestion for changes, he would have adopted those recommendations.

[53] Mr Mackenzie submits it does not matter that the advice confirmed the existing situation rather than inducing the defendant to adopt it. In *R v Cancoil Thermal Corporation* and *Parkinson*, Mr Mackenzie says the Court was not troubled by the fact the advice went to continuing the present state of the unlawful act, rather than prompting it, although the appellate Court was unwilling to decide on the evidence the defence was available.[43]

[54] Mr Mackenzie says that the satisfaction of these six factors should provide a standalone ground for granting a stay or dismissal of the proceedings. However, if the Court is constrained to the test in *Wilson v R*, then this case falls into the second category. He says, citing *Wilson*,[44] that, but for the act of WorkSafe, the prosecution could not have occurred. Had WorkSafe advised there were deficiencies, Mr Donnithorne would have remedied them. Mr Mackenzie says Southern Pallet was entitled to a stay where the doctrine was made out and, but for the advice and reliance on it, Southern Pallet would not be before the Court.

[55] Mr Bain, on the other hand, says that if officially-induced error is to warrant a stay it must meet the threshold in *Wilson* for granting a stay on the ground of abuse of process. In the present case, that must be assessed in light of the fact that this is not a case where the prosecutor has "entrapped" the defendant or caused its offending. WorkSafe did not modify the saw in a way that left it with inadequate guarding,

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[43] *R v Cancoil Thermal Corp* [1986] O.J. No. 290 (CA).
[44] *Wilson v R*, above n 13, at [78]–[80].

Southern Pallet did, and Mr Bain maintained Southern Pallet is trying to shift the responsibility for ensuring workplace health and safety away from it and on to WorkSafe. Mr Bain submitted this runs against the fundamental obligations of the Health and Safety at Work Act (HSWA). Furthermore, it would create a perverse outcome, in that inspectors would be incentivised to reduce or stop workplace engagement to avoid being accused of missing an opportunity to identify a particular hazard.

[56] In any event, on the facts of the case, Mr Bain submits there was no conduct by WorkSafe which would justify dismissal of the charges. The inspector's blanket comments about the company's systems after a 20 minute visit through its warehouse could not reasonably be taken as confirmation that Southern Pallet was complying with all relevant obligations under HSWA. This is reinforced by the fact that inspector Maru did not, on the balance of probabilities, actually examine the saw.

[57] Furthermore, it was unreasonable for Mr Donnithorne to treat the visit as a comprehensive audit on which he could rely, knowing:

(a) he had his own non-transferrable duty under the HSWA to ensure worker safety;

(b) WorkSafe's inspection policy is clear that "it is not practicable for an inspector to identify and assess all risk during an inspection and to check compliance with all aspects of [HSWA]";

(c) the brevity of the visit and the multiple things Mr Maru did during the visit would alert a reasonable person to the fact the visit did not constitute a thorough audit; and

(d) the only relevant comment made by the inspector was "machinery in place are guarded well which was my primary focus for the visit". This was too general a statement to be relied on as certifying that all the machines were safe.

Discussion

[58] Having considered the evidence, and the Judge's factual findings, I am not satisfied that the Canadian test for officially-induced error of law is made out. As a result, I do not need to go on to consider whether, on its own, or in light of the test in *Wilson*, this would be sufficient to establish an abuse of process justifying a stay.

[59] I accept, as WorkSafe submitted, that this is essentially a case where Southern Pallet argues its offending should have been caught earlier, before its employees suffered injury. That argument is unattractive because, contrary to the principles of the HSWA, it would shift responsibility for ensuring workplace health and safety away from the person conducting the business and on to WorkSafe. In other words, even if Mr Maru was found to have inspected the defective saw thoroughly and produced a full report endorsing the guarding, a stay may not be justified. However, Southern Pallet's case is not that strong.

[60] I consider, on the balance of probabilities, the evidence supports Mr Maru having seen the HolyTek saw, but he did not examine it in any detail. As the Judge found, Mr Maru inspected the workplace "in a relatively short time" and most of that time is accounted for by the time stamps of other photographs he took and by other activities, such as speaking to a worker about health and safety, and observing workers using air assisted nail guns. Neither he nor Mr Donnithorne had a specific recollection of him inspecting the saw. Furthermore, he did not photograph the saw and, on his own evidence, if he had looked at it, he "would have absolutely taken photographs of it." The evidence also suggested the saw may not have been being operated at the time of the inspection which again makes it unlikely Mr Maru conducted a thorough inspection of the saw's operation.

[61] While I consider on balance, Mr Maru did not inspect the saw, the judgment did not make a finding on that issue. However, the test for officially-induced error of law places the burden of proof on the defendant and it would be for Southern Pallet to demonstrate Mr Maru did in fact examine the saw and make the error relied on. Its evidence does not go so far as to prove that. Mr Donnithorne was not certain the saw had been inspected but, rather, was satisfied Mr Maru would have been shown it by

reference to its location and the size of the factory. However, the fact Mr Maru would have seen the saw is not sufficient to demonstrate, on the balance of probabilities, that he inspected it thoroughly.

[62] I also note Mr Donnithorne did not inform the people assessing the saw of the modification which had been made since manufacture. While I acknowledge, as Mr Mackenzie says, that the saw should be assessed in the condition it was found, it is a logical inference that particular attention would be paid to a saw that has been modified since manufacture, to ensure it complies with current safety standards.

[63] In any event, the comment that the saws looked "well-guarded" was insufficient to convey that the Holytek saw, as a whole, was fully compliant with the HSWA. The examination of the saw after the accident identified other aspects of the saw's functioning which were deficient and which, by implication, contributed to the risk of injury to workers. These included that the saw's foot pedal was easily activated and did not require a two-handed "hold-to-run" control to operate it, which is considered best practice. This is a separate deficiency from the adequacy of the guarding. The inspector's advice was clearly not a comprehensive analysis of whether Southern Pallet had complied with its duty to ensure the saw was safe to use.

[64] The other factor which is not, in my view, established on the facts is the element of reliance. Southern Pallet also contracted an independent safety company to inspect the workplace and advise on deficiencies. At least one such inspection occurred between the WorkSafe visit and the accident. Logically, reliance on the WorkSafe inspection alone can not be maintained when another inspection supersedes it. More importantly though, I consider reliance must be reasonable in all the circumstances to meet the requirements of officially-induced error. Here, in the context of obligations under the HSWA, the principal responsibility for ensuring health and safety lies with the person conducting a business or undertaking. That positive duty under the HSWA, would make it difficult, if not impossible, to meet the threshold of reliance on official advice to ensure compliance with the HSWA.

Conclusion

[65] I am satisfied the appellant has not established that on the facts presented there was an officially-induced error of law applying the six point Canadian test. I also consider that, in the context of the HSWA, it would be difficult, if not impossible, to establish that reliance on official advice was reasonable when the principal duty to ensure compliance falls to the person conducting the business or undertaking. For these reasons, I do not need to go on to decide whether an officially-induced error of law would support a stay of proceedings or dismissal of a charge, either on its own, or as a discrete category of abuse of process. Those are issues to be determined on another occasion.

[66] Accordingly, the appeal is dismissed.

Solicitors:
Luke Cunningham Clere, Wellington

Copy To:
Mr T J Mackenzie, Barrister, Christchurch