IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2022] NZDC 20694

WORKSAFE NEW ZEALAND
Prosecutor

v

ANDREW BUTTLE
JAMES BUTTLE
PETER BUTTLE
Defendants

Hearing:	6 October 2022
Appearances:	K McDonald KC, S Symon and M Hodge for the Prosecutor D Neutze and N Coyle for the Defendants
Judgment:	18 October 2022

ORAL RULING OF JUDGE E M THOMAS
[s147 application]

The applications under s147 Criminal Procedure Act 2011 are dismissed.

REASONS

Introduction

It is fundamental that a defendant has a fair trial. It is fundamental that a defendant is fully and fairly informed of both the charge and the case against them. It is fundamental, to get a fair trial, a defendant is informed promptly.

[1] What information you get as a defendant will depend upon what stage of the prosecution we are at. As a defendant you are entitled to and should receive certain information when you are charged. You are entitled to and should receive certain other information and documentation at the time you are charged or shortly afterwards. As a defendant who pleads not guilty you are entitled to and should receive full disclosure. That is, a copy of everything that the prosecution has on its file or in its possession that is relevant to the charge that you face. As a defendant you are entitled to and should receive details as the prosecution becomes aware of them, of witnesses the prosecution might call. You should also receive full written advice of what it is the prosecution anticipate a witness will say at trial. There remains also on the prosecution ongoing obligations of what we call disclosure, so in other words as more relevant information comes into the hands of the prosecution in the lead up to trial, you as a defendant need to be provided with that information.

[2] Usually much of that information is not available to the prosecution at the time it considers it has enough evidence to charge someone. At the time it does decide to charge someone, it files a charging document. There are requirements about what needs to be contained in a charging document. A charging document must contain enough particulars or details to fully and fairly inform a defendant of the substance of the offence that they are alleged to have committed.[1] The charging document must do that, but it does not need to do more than that.

[3] Here, each of Mssrs Buttle (the Buttles) are charged as directors. They were charged very close to the time deadline by which WorkSafe needed to file charges. They were given very little time to respond to an invitation to be interviewed or

[1] S 17(4) of the Criminal Procedure Act 2011.

provide further information to WorkSafe. The charging documents against each of them only contain statutory language, in other words language that has been imported directly from the statute. Other defendants were provided much more detail in their charging documents. There are cases that have held that simply using the statutory language in the charging document is not enough.

[4] In respect of each of the Buttles, the allegation in the charging document is:

> Between 4 April 2016 and 10 December 2019 at Whakaari White Island being an officer of a PCBU namely Whakaari Management Limited, having a duty to exercise due diligence to ensure that the PCBU complies with its duties as a PCBU, failed to comply with that duty, and that failure exposed any individual to a risk of death or serious injury arising from volcanic activity.
>
> Particulars: [the defendant concerned] failed to take the following reasonable steps:
>
> (a) To acquire and keep up to date knowledge of work health and safety matters.
>
> (b) To gain an adequate understanding of the hazards and risks associated with the PCBU permitting access to Whakaari.
>
> (c) 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.
>
> (d) To ensure that the PCBU had and implemented a process for complying with its duties or obligations under s 36(2) and/or 37 of the Health and Safety Work Act 2015.

[5] The Buttles say that this is not enough to fully and fairly inform them of the substance of the charge that each of them faces.

The applications

[6] These are the Buttles' applications under s 147 of the Criminal Procedure Act. They say that the charging documents are defective in such a way that they cannot be remedied, and therefore they are a nullity and should be dismissed. Alternatively, that continuing these proceedings, given the way the charging documents have been framed, would be an abuse of process warranting either a stay or the charges being dismissed. WorkSafe opposes.

In each case, is the charging document defective?

[7] No.

[8] I acknowledge that more specific particulars or details are in the charging documents for other defendants. That does not mean the Buttles' charging documents are defective. They are not charged as the PCBU, the primary duty holders. They are charged as directors. The question will always be whether what is in a particular defendant's charging document is enough. Does that charging document convey the pith and essence of the charge that defendant faces? Whether it does so will depend on the individual circumstances of the case.[2]

[9] What is in the Buttles' charges is taken directly from the Act. There are cases that have held in instances involving PCBUs, that is not enough. Perhaps even in most cases that would not be enough, certainly in relation to PCBUs. Charges involving directors still need to have enough in them to identify though the pith and essence of the charge. How much is needed to do that will vary from case to case and depends on the circumstances of each case.

[10] The Buttles argue that here the details are merely lifted from s 44(4). That what the charging documents needed to say was what reasonable steps they failed to take in breaching the duty set out in the charging document. The Buttles say that the steps that WorkSafe say should have been taken are more than just the details upon which it relies to prove the charge. That identifying these steps are the very pith and essence of the charges that they face. They rely on the *Talleys* decision for that proposition and cases that have applied *Talleys.*

[11] However, in *Talleys* it was acknowledged even in that case, that how much detail is required is a matter of debate. That this is not simply a yes or a no situation. In *Talleys* there was arguably less particularisation, less details than we have ended up with in the charging documents relating to the Buttles. Directors can fall into a separate category. When it comes to directors we are talking about a failure to exercise

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[2] *P v Wyatt* [1966] NZLR 1118, CA and *WorkSafe New Zealand v Talleys Group Ltd* [2018] NZCA 587, [2019] 2 NZLR 198.

due diligence as opposed to breaching a primary duty of care. That takes directors at least a step away from the incident or the activity that has resulted in the accident or harm. And it places them at a more strategic level of responsibility.[3]

[12] *Talleys* dealt with an examination of steps that were taken and steps that were not taken. So, particularising those steps was the pith and essence of that charge. The particulars here are not that the Buttles took some steps but not others, it is that they failed totally. Here the case against them is that no steps were taken. That is the pith and essence of the case against them, that is the pith and essence of these charges.

[13] *Talleys* is not authority for the proposition that if you only use statutory language a charge is defective. It is not authority for the proposition that if you fail to particularise every reasonable step that may be the subject of the prosecution case a charge is defective. In *Talleys*, those failures made the charges defective. But that is because of the way the prosecution decided to run its case in *Talleys*. Whether a charging document is sufficiently particularised will depend always on the circumstances of the individual case.

[14] The Buttles rely on Australian authorities involving the acts or omissions of directors. Because so much depends upon the circumstances of an individual case, other cases may not always assist. For other reasons the cases that the Buttles rely upon do not assist them here:

(a) *WorkCover Authority of New South Wales v Customised Gas Australia Group* NSWDC 361 and *WorkCover Authority of NSW v E&T Bricklaying Pty Ltd* [2015] NSWDC 369: these were not cases that dealt directly with the sufficiency of particulars.

(b) *SafeWork NSW v Hetherington* [2019] NSWDC 11: this was a case about whether describing particulars in a way that was more akin to those for a primary duty holder meant that there was no disclosed defence in respect of an officer of that PCBU.

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[3] *SafeWork NSW v Neville George Heatherington* [2019] NSWDC 11.

[15] The Buttles also rely upon *Kirk v Industrial Relations Commission* [2010] HCA 1, [2010] 239 CLR 531. However, this was a reverse onus case, and by that I mean that once the prosecution has met a certain threshold in the evidence it is for the defendants then to do all the proving. The extent and need for particulars is greatly heightened for that reason. For that reason, this case is distinguishable.

[16] The Buttles argue that as they are, the charging documents here do reverse the burden of proof. In other words, they claim that it places an obligation on the Buttles to show that they took some steps when ordinarily a defendant is not required to show anything. Maybe the Buttles might wish to show that, maybe they might not. But they do not have to, and the charge in its current form in respect of each of them does not change that. WorkSafe has said its allegations against the Buttles are that each of them did nothing. Ms McDonald went on the record to confirm that is WorkSafe's case. WorkSafe has, as a matter of record then, nailed its colours to the mast in that respect. The burden of proof does not require the Buttles to prove anything. It requires WorkSafe to prove that each of the Buttles has not exercised the necessary due diligence, in that they did nothing in respect of the four particulars identified in the charging documents. No doubt WorkSafe has and will continue to give serious thought as to whether it can prove that.

The remaining grounds

[17] I do not need to consider the application further. But I will comment briefly on what would have occurred had I found the charging documents to be defective.

[18] New Zealand courts have always taken a permissive approach to these sorts of applications. Rather than dismiss charges, they have always instead tried to find a way to remedy a defect in such a way that will allow a trial to fairly go ahead. The touchstone has always been, and always will be, fairness. The public interest requires allegations to be tested properly at trial. The public interest also demands this happens fairly. That a defendant has a fair opportunity to meet allegations levelled against them, and to test those allegations.

[19] I sympathise not only with the Buttles but all those who have had to wait a long time for this case and this investigation to crystalise. In a perfect world, things would

happen much faster. However, the evidence advanced by the Buttles falls well short of establishing any bad faith or improper motive on the part of WorkSafe. I would not have found there to have been an abuse of process.

[20] With nine months still until trial I would not have found that there would have been any prejudice to the Buttles' fair trial rights in any amendment to the charges had that been required.

Result

[21] The applications by the Buttles are dismissed.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/10/2022