

**IN THE HIGH COURT OF NEW ZEALAND
BLLENHEIM REGISTRY**

CRI-2008-406-3

TL & NL BRYANT HOLDINGS LIMITED
Appellant

v

MARLBOROUGH DISTRICT COUNCIL
Respondent

Hearing: 22 April 2008

Appearances: D J Clark for the Appellant
P J & M J Radich for the Respondent

Judgment: 16 June 2008 at 12 noon

RESERVED JUDGMENT OF CLIFFORD J

Introduction

[1] In November 2006, the appellant company, T L & N L Bryant Holdings Limited (“Bryant Holdings”), built a stopbank – on land it owns and farms (“the Land”) – along some 450 metres of the south bank of the Pelorus River. It did so without first obtaining a resource consent.

[2] An adjoining landowner complained to the local authority, the Marlborough District Council (“the Council”). The Council investigated matters and issued an abatement notice. Bryant Holdings then applied for, and was granted, a retrospective resource consent for the stopbank.

[3] The Council subsequently charged the appellant, pursuant to s 338(1) of the Resource Management Act 1991 (“the RMA”), with a contravention of s 9 and an attempted contravention of s 14 of that Act. In the District Court at Blenheim on 25 January this year Judge Thompson convicted and fined the appellant \$10,000 on each charge.

[4] Bryant Holdings now appeals against conviction and sentence as regards both charges.

The charges

[5] The Council is a unitary authority. Accordingly, it has jurisdiction in respect both of land use in and of itself (s 31 of the RMA) and land use as it affects water (s 30 of the RMA).

[6] As is well known, the use of land and of water are dealt with differently under the RMA. Under s 9, the regime as regards the use of land is permissive. Land may be used in any manner unless its use is restricted by a rule in a district plan or proposed district plan. Under s 14, the regime as regards the use of water is restrictive. Water cannot be taken, used, dammed or diverted unless, in general terms, that action is allowed by a rule in a regional plan or in a relevant proposed regional plan, or by a resource consent.

[7] As regards relevant controls on the use of land, rule 36.1.5.3 of the Marlborough Sounds Resource Management Plan (“the District Plan”) deals with excavation and filling. Rule 36.1.5.3.6 provides as follows:

36.1.5.3.6 Riparian areas

Except for direct approaches to bridges, crossings and fords; maintenance of rail and public roads; and trenching for cable laying, no excavation or filling must take place within riparian management zones as specified in the schedule of water bodies in Appendix I and as mapped in Ecology Maps in Volume Three, or in a manner or location where the General Conditions for Land Disturbance cannot be complied with.

[8] Therefore, to place fill on land in a riparian management zone, or in a manner or location where the General Conditions for Land Disturbance could not be complied with, required a resource consent.

[9] As regards relevant controls affecting the use of water, the District Plan provides that damming or diversion for flood control purposes was a permitted activity, subject to a number of conditions. Those conditions include notification to the Council in writing at least 10 working days prior to the commencement of any work. These provisions are contained in clause 26.1.3.2 of the District Plan.

[10] It can therefore be seen that:

- a) building a stopbank in a riparian management zone required, in terms of the District Plan's restrictions on land use and the placing of fill on land, a resource consent; whereas
- b) to the extent that it constituted a diversion of water, building a stopbank was a permitted activity in terms of the District Plan's restrictions on the use of water, subject to compliance with certain conditions, including as to notification.

[11] Bryant Holdings was charged with respect to s 9 on the basis that the construction of the stopbank constituted filling within a riparian management zone without a resource consent, in breach of the prohibition in rule 36.1.5.3.6.

[12] Bryant Holdings was charged with respect to s 14 on the basis that, as it had not given notice, rule 26.1.3.2 did not apply. Therefore, without being expressly allowed to do so by a rule in the District Plan and without a resource consent, it had attempted to divert flood waters within the flood plain of the Pelorus River by constructing the stopbank. The attempt charge was laid because Bryant Holdings obtained its retrospective resource consent before, in fact, the Pelorus River was diverted by the stopbank it had built.

The District Court decision

[13] At the hearing of the charges in the District Court, and on the basis of the Judge's decision, Bryant Holdings' defence would appear to have been advanced on the basis that the two rules (26.1.3.2 and 36.1.5.3.6) were in conflict, and that two of the conditions in rule 26.1.3.2.1 were ultra vires the RMA.

[14] The Judge first concluded that, on a prima facie basis, the charges had been made out. He did so at [9] in the following terms:

On the face of it then, it seems to be clear enough that in terms of the landuse prosecution alleging a breach of s9 that the stopbank was constructed, and that no resource consent existed to authorise it. Similarly, the whole purpose of a stopbank is to divert floodwater, and that is what occurred here. The charge under s14 is also prima facie made out.

[15] He then went on to consider the arguments raised by Mr Clark for Bryant Holdings.

[16] He concluded that the two rules were not "in conflict", addressing as they did separate issues as regards land use and the diversion of water. As regards the former, the unchallenged evidence was that the Land was in a riparian management zone, and therefore rule 36.1.5.3.6 applied.

[17] The Judge then considered Mr Clark's challenge to the conditions found in rule 26.1.3.2.1, on the basis that they were ultra vires. That rule provides as follows:

26.1.3.2.1 Conditions

- a) The Council is to be notified in writing at least 10 working days prior to the commencement of any work. The notifications shall give notice of:
 - The location of the works;
 - A description of the works;
 - The date of commencement of works; and
 - An estimation of the duration of the damming or diversion.
- b) That any diversion shall be limited to that contained within the existing flood channel of any watercourse.

- c) That any damming or diversion of water shall not have any adverse effect on any flora or fauna or recreational values.
- d) That no person shall dam any river or stream or divert any water so as to adversely affect any land owned or occupied by another person.

[18] The defence argued that the condition in rule 26.1.3.2.1(a) constituted an unlawful restriction on what was otherwise a permitted activity. That argument was based on s 77B(1) of the RMA which provides as follows:

If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

[19] The defence's argument was that "conditions" could only relate to the activity itself, and could not – as Mr Clark put it – involve some pre-activity notification.

[20] The Judge did not agree with that proposition. He concluded that notification could be regarded as part of the activity. He thought it easily understandable why a Council would wish to have that notification in such a sensitive area.

[21] The Judge recorded that Mr Clark had argued further that the condition in rule 26.1.3.2.1(d) required a subjective assessment that was at odds with rules about permitted activities.

[22] The Judge noted that whilst there might be some argument about that issue, the very recent decision of *Friends of Pelorus Estuary v Marlborough District Council* EnvC BLE ENV-2007-CHC-000113 24 January 2008 indicated that the "prohibition" on some sort of assessment was not as absolute as that. Judge Thompson concluded at [16]:

Within reason, an assessment can be made by a regulatory authority and decisions made about it. Such assessments may involve some form of evaluation and in this case I would have thought that was straightforward enough.

[23] In any event, the Judge was of the view that the issue of ultra vires was not one that could be raised in a prosecution context. In that, he relied on the decision of

the High Court in *Smith v Auckland City Council* [1996] NZRMA 27, as confirmed by the Court of Appeal: see [1996] NZRMA 276.

[24] On the basis that it was plain to him that the conditions in rule 26.1.3.2.1 had not been complied with, and that it was equally plain that the Land was in a riparian management zone to which the prohibition on excavation or filling in rule 36.1.5.3.6 applied, the Judge entered convictions on both charges.

[25] In a separate sentencing memorandum (sentences being imposed immediately after the entry of convictions), the Judge concluded that a penalty in the overall range of \$20,000 was called for, particularly to recognise the need for deterrence. He divided that amount equally between the two charges.

Grounds of appeal

[26] In its written notice of appeal the appellant asserted that the Judge:

- a) erred in law in finding that the issue of ultra vires could not be raised in the context of a prosecution;
- b) misinterpreted rule 36.1.5.3.6;
- c) erred in finding that conditions (a) and (d) to rule 26.1.3.2 were to be regarded as lawful; and
- d) erred on the basis that the sentences imposed were manifestly excessive.

[27] In its written submissions, the appellant considerably shifted the grounds of its appeal. It added two new grounds of appeal. First, it challenged the conviction under s 14 on the basis that the RMA did not provide for attempt offences, and that there had not been any actual diversion of the Pelorus River prior to the appellant obtaining its resource consent. There had therefore been no breach of s 14. Second, as regards s 9 it asserted that, notwithstanding its acceptance of this matter in the

District Court, the Land was not in fact in a riparian management zone. Furthermore, the appellant had not breached the General Conditions for Land Disturbance.

[28] At the hearing, the appellant changed the grounds of its appeal again.

[29] Having considered the respondent's submissions in reply on the question of attempts, it was apparent the appellant realised that s 72 of the Crimes Act did apply to offences under the RMA. At the hearing, therefore, it argued instead that what the appellant had done did not, as a matter of law, constitute an attempt to commit the offence of diverting water without a resource consent.

[30] As the respondent submitted, the way in which this appeal was argued, relative to the way in which the charges were defended and the notice of appeal was expressed, is less than satisfactory. The respondent objected, in particular, to what it submitted was the appellant's attempt to re-argue factual matters – in particular, whether the Land was or was not within a riparian management zone, something that had been conceded at trial. I will consider those issues, as well as the substantive points raised by the appellant, in analysing each of the points on appeal.

Approach to this appeal

[31] Appeals under the Summary Proceedings Act are general appeals by way of rehearing. The traditional approach has been that the appellant bears the onus of satisfying the Court that it should differ from the original decision, and any weight given by the appellate Court to the original decision is a matter of judgment.

[32] The approach has been discussed and modified by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103. The Supreme Court said at paragraph [16]:

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that

matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[33] I approach this appeal accordingly, noting here that the appellant has largely based its appeals on matters of law, together with – on the issue of whether the Land is in a riparian management zone – an issue which is a mixed question of law (the classification in the District Plan of riparian management zones) and of fact (the actual location of the Land relative to that classification).

Discussion

[34] I will consider the issues raised by this appeal first as regards the conviction entered with respect to s 9, and then as regards the conviction with respect to s 14. I will then address the appellant's challenge to the sentences imposed.

Section 9 – Was the Land located in a riparian management zone

[35] Mr Clark correctly and properly acknowledged that the appellant had conceded, during the District Court hearing, that the Land was located within a riparian management zone. Notwithstanding that concession, in his written submissions on appeal Mr Clark challenged that proposition. He argued that riparian management zones were, in terms of rule 36.1.5.3.6, areas of land as “specified in the schedule of water bodies in Appendix 1 and as mapped in the Ecology Maps in Volume Three”. Mr Clark's submission was that the Volume Three maps demonstrated that the Land did not fall within a riparian management zone. The riparian management zone, in his submission, appeared to protect the old river bed, which was now a tributary of the Pelorus River. The riparian management zone did not cover that part of the Pelorus River, which was a deviation from its old river bed, that ran through the Land.

[36] Mr Clark endeavoured to establish that proposition by providing to me what I understood from him was an enlargement of one of the Volume Three maps, and by referring me to an aerial photograph of the general area, which was produced as an

exhibit by the Council's witness at the hearing. By comparing the two, Mr Clark submitted that the Land was not in a riparian management zone and that I should allow the appeal on that basis.

[37] In response to Mr Radich's submission that this matter had been conceded during the District Court hearing, and that it was now too late to raise what was essentially an evidential point, Mr Clark submitted that this was in fact a question of law.

[38] I have considerable sympathy for Mr Radich's proposition that, having conceded the issue at the District Court hearing, it is now too late for Mr Clark to raise this issue. Having said that, however, on the basis of the material put before me – albeit I note on a somewhat unsatisfactory basis – it would appear to be clearly arguable that, by mistake or otherwise, the Land is not shown in the relevant Volume Three map as forming part of a riparian management zone. On that basis, there may be an argument that, in terms of the District Plan, rule 36.1.5.3.6 does not apply to the Land. If that were the case, the filling constituted by the construction of the stopbank would be a permitted activity, subject to compliance with the rule 36.1.5.1 General Conditions.

[39] In terms of a legal response to Mr Radich's proposition that it is now too late for Mr Clark to raise this issue, I consider that the essential question is whether, this matter now having been brought to the Court's attention, it is in the interests of justice for Bryant Holdings' conviction to stand, or whether the matter should be reconsidered by the District Court.

[40] I do not think, as Mr Clark submitted, that it is a matter to be answered by reference to distinctions between questions of law and fact. In the District Court, the factual matter – namely, that the Land was within a riparian management zone – was conceded. Whether that was on the basis of an erroneous understanding of the legal position by Mr Clark, or whether it was on some other basis, is not particularly relevant. In terms of the question whether it is in the interests of justice for Bryant Holdings' conviction of an offence against s 9 to stand, I am mindful that it is a criminal offence for which Bryant Holdings has been found guilty. Furthermore, on

the basis of the material placed before me there would, as I have acknowledged, appear to be a prima facie argument that the Land, at least by reference to the relevant Volume Three map, is not located within a riparian management zone. I appreciate Mr Radich's point that there may be further arguments to be made, based on other specifications of riparian management zones found in the District Plan, that the Land is located within a riparian management zone. If, however, the Land is not located within a riparian management zone when the District Plan is considered in its entirety, then I do not think it would be just for the conviction against Bryant Holdings to stand.

[41] In my judgment, therefore, the appropriate course of action for me is, in terms of s 131 of the Summary Proceedings Act, to direct that the information laid against the appellant for a breach of s 9 be reheard.

[42] At that re-hearing, being in terms of s 131 a re-hearing of the whole information, the question of the appellant's compliance with the General Conditions for Land Disturbance may also be reheard. Before me, the appellant submitted that there was no evidence at the District Court hearing that the appellant had breached those conditions. Whether such a breach had occurred was the subject of some inconclusive argument before me, again with reference being made to various materials placed before the District Court by the Council. The question of the status of the Land as falling within a riparian management zone having been conceded at trial, and a conviction having been entered on that basis, it was not surprising that little attention was paid in the District Court to the alternative basis upon which a breach of s 9 could have been established, namely a breach of those General Conditions. It will of course be open for the District Council to pay more attention to that matter in its evidence at the re-hearing.

Section 14

[43] As the attempt charge depended in particular on notice not having been given (as if it had been there would (condition (d) aside) not have been an offence), I will first consider whether the Judge was correct to conclude that conditions (a) and (d) in rule 26.1.3.2.1 were valid, and that, in any event, the appellant could not, in a

prosecution, challenge the validity of those conditions. I will then consider whether the elements of the charge of attempting to divert the Pelorus River without a resource consent were established.

Rule 26.1.3.2.1 – ultra vires conditions

[44] Mr Radich suggested that a sensible way to consider Mr Clark’s challenge to the vires of conditions (a) and (d) in rule 26.1.3.2.1 was first to consider whether those conditions were, as Mr Clark argued, invalid because they in some way inappropriately qualified the otherwise permitted activity of diverting a river for the purposes of flood control (see rule 26.1.3.2). If those conditions did not fail for that reason, then it would not be necessary for the Court to consider the broader, and more difficult, question of whether, and to what extent, challenges to the validity of rules in a District Plan could be made in the context of a prosecution. I note that Mr Clark, in submitting that the Judge was in error in holding that such challenges could not be made in the context of a criminal prosecution, relied on the authority of *Brader v Ministry of Transport* [1981] 1NZLR 73 at 80.

[45] I agree with that suggestion, and will approach the issues on that basis.

[46] As regards condition (a), Mr Clark’s argument was that this condition breached s 77B because the condition did not relate to the activity itself, but rather required “a pre-activity notice on a permitted activity”. Mr Clark submitted that the condition was unique, and was certainly not one that he had been able to find in any other rule in any other planning document of a similar nature. As regards the Judge’s comment, that the giving of notice to the Council before undertaking work could be said to be part of the activity, Mr Clark disputed that that interpretation was available. Were that to be the case, any Council would be able to “pre-condition any permitted activity by requiring the person first to submit what they proposed to do to the Council”. He submitted that the whole purpose of a permitted activity was that it was one that could be undertaken as of right, and did not require the person wishing to undertake that activity to deal with the Council.

[47] In support of that proposition he referred to authority that, as regards a permitted activity, a Council could not reserve a discretion unto itself.

[48] It is to be noted first that the condition requiring notification to the Council does not reserve any discretion to the Council, in that it does not require any form of subjective judgment to be made. In fact, it does not require any decision by the Council at all. Rather, it simply requires that a condition be met, namely the provision of notification.

[49] Moreover, I do not consider it is necessary to read the word “conditions” in s 77B as only entitling a territorial authority to specify a condition which relates directly to the nature of the activity, as and when it is being carried out, as opposed to, in this instance, requiring the giving of notice. The giving of notice here would appear to be an administrative convenience for the Council. No doubt, as submitted by Mr Radich, notice provides a basis for the Council to ensure that the work, when carried out, is done so that the parameters of the permitted activity are not exceeded. In my judgment, therefore, condition (a) of rule 26.1.3.2.1 is not ultra vires the RMA.

[50] Turning to condition (d), Mr Clark’s challenge here was that the concept of adverse effect on any land owned or occupied by any other person was too uncertain as to provide the basis for an appropriate condition. I do not agree with that proposition. Whilst this condition clearly creates a high threshold, in terms of the classification of diversions that would constitute a permitted activity, it is nevertheless a clear threshold. To be a permitted activity, the diversion is not allowed to have an adverse effect on other landowners. Moreover, the fact that any effect which is adverse disqualifies the works from being permitted brings clarity to the condition. There is no value judgment to be made here, in the sense that the reservation of an essentially subjective judgment to a territorial authority in determining whether an activity is a permitted activity is not acceptable under the RMA. (See *Brookers Resource Management* paragraph 76.10 and the cases cited there.) If there is an adverse effect, the diversion does not constitute a permitted activity and can only proceed with a resource consent.

[51] Moreover, as I indicated at the hearing of this appeal, it was not clear to me that the Council had, in this prosecution, relied on there having been a breach of condition (d). Therefore, and in terms of the way the Council prosecuted this offence, it was not clear to me that the appellant's challenge to condition (d) was a relevant one.

[52] I turn now to the question of the right of a defendant to raise issues of validity in a prosecution for a breach of rules in a resource management plan.

[53] That broader question is a complex one, as evidenced by the recent decision of Randerson J in *Harwood v Thames Coromandel District Council* HC HAM A52/02 10 March 2003, the two House of Lords cases, *R v Wicks* [1998] AC 92 and *Boddington v British Transport Police* [1999] 2 AC 143 referred to by Randerson J in *Harwood*, and the earlier High Court decision of Elias J, as she then was, in *Brady v Northland Regional Council* HC WHA AP25/95 16 August 1996.

[54] As Randerson J put it in *Harwood* at [20]:

There has long been difficulty in deciding in what circumstances an accused person may be permitted to challenge the validity of subordinate legislation or an administrative act either in the context of a criminal charge or by way of a defence to a demand for payment. A challenge of this kind in criminal or civil proceedings is described as "collateral" to distinguish the challenge from one made directly, for example, in separate judicial review proceedings or in a claim for a declaration that the legislation or act in question is unlawful. As it is put in *Wade and Forsyth, Administrative Law* 8th ed; p 286, a collateral challenge, in its customary sense, refers to "challenges made in proceedings which are not themselves designed to impeach the validity of some administrative act or order".

[55] Randerson J went on to acknowledge that *Wicks* and *Boddington* had both reaffirmed the citizen's right under the rule of law to defend proceedings by a collateral challenge to subordinate legislation, much as Elias J had found in her earlier decision in *Brady*. *Brader*, on which Mr Clark relied, is an earlier example of the recognition in New Zealand of that general principle.

[56] As was found in *Boddington*, however, Randerson J agreed that the ability to bring a collateral challenge may be displaced by a clear parliamentary intention to

the contrary. Thus, and in the context of the issues he was considering, he concluded at [29]:

I have concluded that the statutory context under the Dog Control Act and other statutory provisions displace the general principle that an accused person is entitled in criminal proceedings to challenge the validity or lawfulness of a public act or decision upon which his conviction depends.

[57] In light of that general authority, the issue becomes one of whether *Smith* (see above at [23]) is, as assessed by the Judge, binding authority that the RMA demonstrates a Parliamentary intention to exclude challenges to rules in district plans based not only on the proposition that the procedures in the First Schedule have not been complied with (as expressly provided in s 83), but also that (equivalent to the finding by Randerson J in *Harwood* in the context of the Dog Control Act) an accused person in criminal proceedings under the RMA is not entitled to challenge the validity or lawfulness of any public act or decision upon which his conviction depended.

[58] In *Smith* the issue, as relevant here, was whether it was open for the Judge in the District Court to traverse the issue of whether a tree (the pine tree on One Tree Hill) was validly listed as scheduled in an operative plan, in the context of a prosecution of injuring a scheduled tree. The defence had argued that there had been deficiencies in the way the Council had come to “designate the tree”. It had, as recorded in Fisher J’s High Court decision, failed adequately to consider the tree’s history, the importance of the land to Māori, and the inappropriateness of protecting this tree which was particularly offensive to Māori. Fisher J went on to record at 640:

Those are matters which would certainly need to be carefully considered when drawing up or reviewing the district plan. However no one was conducting that exercise on this occasion. Section 9 picks up the matter at a point which presupposes the plan’s valid existence. That I think is made plain by s 76(2) which, as I said, provides that the rules in the plan are to have the force and effect of regulations. Also relevant is s 83 which provides:

83. **Procedural requirements deemed to be observed** – A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with the First Schedule and shall not be challenged except by an application for an enforcement order under section 316(3).

This was not an application for an enforcement order. Therefore the plan could not be challenged in these proceedings. While there may or may not be argument as to the designation of this tree in some other context, it was not open to the Judge to traverse that issue in the context of the prosecution before him.

[59] The Court of Appeal upheld Fisher J, on that point, in these terms at 278:

The third issue related to the listing or scheduling of the tree as a protected tree in the operative and proposed plans. The appellant submitted that the council had inappropriately designated the tree, which on the evidence he led, was offensive to Māori.

Evidence of this kind should properly be taken into account when a district plan is prepared or reviewed. However, in agreement with the High Court, we consider that s 9 pre-supposes the valid existence of a plan or proposed plan. Section 76(2) and s 83 reinforce that conclusion. By way of answer to a prosecution for injuring a scheduled tree a defendant cannot claim that the listing process reached the wrong conclusion.

[60] As can be seen, therefore, the reasoning adopted is that s 9 presupposes the plan's valid existence. That, in turn, is said to be made plain by s 76(2) and s 83 which, in the words of the Court of Appeal, "reinforce that conclusion". As I read the Court of Appeal's decision, therefore, the principal ground for concluding that a collateral challenge is not open to a defendant in a prosecution under the Resource Management Act is that s 9, and I conclude by the same token s 14, "presuppose a plan's valid existence".

[61] On that basis, and recognising (to adopt the phrase of the Chief Justice in *Brady* at [20]) that before me "these deep waters were hardly stirred in argument", there is clearly a basis in the *Smith* decisions for concluding – as the Judge did – that the challenges to conditions (a) and (d) proposed by Mr Clark were not matters which the Judge could properly consider in the context of a prosecution.

[62] I recognise, however, that the issue is not clear-cut. In many of the cases I have referred to there are repeated references to the significance under the rule of law of the availability of collateral challenges in criminal prosecutions under delegated legislation. I am therefore more than a little hesitant to conclude that *Smith* is, as apparently accepted by the Judge, authority for the proposition that there will be no circumstances in which a collateral challenge will be available to a prosecution under the RMA.

[63] On the basis, however, that I do not consider Mr Clark established adequate grounds to challenge conditions (a) and (d), I do not propose to take that issue any further.

Attempt

[64] Acknowledging that s 72 of the Crimes Act did apply to the RMA, and that therefore the primary argument on attempt that had been advanced in his written submissions could not prevail, Mr Clark argued at the hearing of this appeal that Bryant Holdings could not in the circumstances be guilty of an attempt.

[65] Mr Clark submitted that what Bryant Holdings had done did not constitute a criminal attempt at all, relying on *R v Donnelly* [1970] NZLR 980 and, in particular, comments of Birkett J in *R v Percy Dalton (London) Limited* (1949) 33 Cr.App.R 102, as referred to in *Donnelly*. Mr Clark's submissions addressed both what Bryant Holdings had done, and whether it had the necessary intent.

[66] Section 72 of the Crimes Act provides as follows:

Attempts

- (1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
- (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit to, is a question of law.
- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

[67] On the basis of the approach taken by s 72 to the offence of an attempt, I think it is appropriate to consider first the question of intention (subs (1)), and then to consider the question of whether what Bryant Holdings did was capable of constituting an attempt (subs (2) and (3)).

Bryant Holdings' intention

[68] In addressing the issue of intention Mr Clark, as I understood it, suggested that the intent that had to be proved was that, knowing it needed a resource consent and with the knowledge that it did not have one, Bryant Holdings proceeded to build the stopbank without any intention of obtaining such a resource consent prior to the river actually being diverted. In other words, if a person had built a stopbank, knowing they needed a resource consent and knowing that they did not have one, but intending to obtain that resource consent before a flood was likely to occur, then such a person could not be convicted of the offence of attempting to divert the waters of the river without a resource consent. Mr Clark framed these submissions in the more general context of there being a lack of authority as to the intent required under s 72 where the attempt is to perform an offence of strict liability.

[69] Further, I took Mr Clark's submission to be that, on the basis of the transcript of the hearing before the Judge and of his decision on conviction, the Crown had not separately addressed the need to prove intent. Therefore that element of the case had not been established.

[70] As regards Mr Clark's basic submission, that s 72(1) requires, even where an attempt is to commit a strict liability offence, the establishment of intent, I accept that proposition. The question, in my judgment, is what is the intent that is required to be established here. Having regard to the elements of the offence under s 14, it is in my judgment necessary for the Crown to prove to the satisfaction of the Judge beyond reasonable doubt that the appellant intended by its action of constructing the stopbank to divert the waters of the Pelorus River knowing that, as a matter of fact, it did not have a resource consent and knowing that, again as a matter of fact, it had not notified the Council of the proposed action. It is not, in my judgment, necessary for the Crown to establish that the appellant knew it required a resource consent, in the absence of notifying the Council. On an attempt, as for a substantive offence, ignorance of the law provides no defence. Moreover, and responding to Mr Clark's argument, although there was no evidence before the Court at the original hearing on any of these issues, it would not be a defence for the appellant to establish that, in some way, it had intended to apply for, and expected to receive, a resource consent

before it anticipated that the Pelorus River would flood and thereby be diverted. If evidence was provided that that was the state of mind of the appellant, that would be relevant in terms of culpability and sentencing. It would not, in my judgment, provide a defence to the charge of attempt.

[71] Mr Radich did not dispute the proposition that it was necessary to establish intention. His submission was that the appellant had:

- a) plainly formed the intent to divert water; and
- b) plainly proceeded knowingly without the requisite authority, and had completed the work so that everything was in place to produce a diversion as soon as the water levels had risen.

This was, therefore, clearly an attempt.

[72] In terms of the Court's consideration of the question of intent Mr Radich was, as I understand matters, principally relying on comments that the Judge made at the time of sentencing. In his sentencing notes, and addressing issues of culpability, the Judge commented as follows at [7] and [8]:

In terms of the attitude of the defendant, I must accept the proposition that nobody who is involved in the farming industry alongside a river and who has a relationship with the contractor who did the work, could not [sic] possibly have done this without turning their minds to the possibility that at the very least a resource consent was required. Indeed the evidence here is that Mr Bryant approached the Council about the possibility of a stopbank being constructed. He was told that no funding existed for the Council to do and that if a stopbank was to be constructed, it would have to be at his company's cost. A deliberate choice was made to do that.

I need to accept as a matter of logic that that cannot have been done without the turning of minds to the possibility of a resource consent being required, and that a choice was made to do the work and, if there were to be consequences, they would be faced later.

[73] I accept Mr Radich's submission that, in this paragraph, the Judge was commenting on the state of mind of Bryant Holdings. Nevertheless, the Judge's decision – that is, his reasons for conviction – do not reflect him, in arriving at his decision to convict, having turned his mind to the need for him to be satisfied

beyond reasonable doubt that Bryant Holdings had the relevant intent that I have, at [72], found is required.

[74] I am therefore not satisfied that, in terms of the elements of the offence itself, the need for an intent of the type I have found to be necessary to be established beyond reasonable doubt was considered and determined by the Judge.

[75] In reaching that conclusion, I make no criticism of the Judge. As I have set out above, this appeal has been argued on a completely different basis than the case was argued before the Judge and, in particular, in terms of the way in which Bryant Holdings defended itself in the District Court.

Bryant Holdings' actions

[76] Mr Clark relied on *R v Donnelly* in support of his proposition that, as a resource consent was ultimately granted prior to any water having been diverted and therefore an actual offence occurring, what had been done could not be said to have been an attempt. In this, he relied specifically on the following comment of Birkett J in the English case *R v Percy Dalton (London) Limited* where, as quoted in *R v Donnelly*, Lord Birkett at 110 said as follows:

Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime.

[77] Mr Radich's submission, as regards the actus reus of the offence, was that Bryant Holdings had completed the construction of the stopbank so that everything was in place to produce a diversion of water as soon as water levels had risen to the relevant point. Bryant Holdings had done everything necessary to achieve a diversion of flood water, and all that was required was the appropriate weather conditions.

[78] I note that *R v Donnelly* is, itself, of little assistance to the applicant. *R v Donnelly* is authority for the proposition that if it is in the relevant circumstances

legally impossible for a crime to be committed, a person cannot be guilty of an attempt. Thus, in *Donnelly* a conviction for “attempted receiving” was set aside on the basis that the goods that were the subject of the attempt had already been returned to their owner. That principle itself has no application to the present proceeding. If sufficient rain had fallen and the waters of the Pelorus River had been diverted, without a resource consent having been obtained, the offence would have occurred. In my view, therefore, no question of impossibility, legal or otherwise, arises. As regards the passage of Lord Birkett from *Dalton*, Mr Clark’s argument appeared to be that, because Bryant Holdings subsequently obtained a resource consent, and that therefore there had been no unlawful diversion, what Bryant Holdings had done could not constitute an attempt.

[79] The cases on attempt reflect the undoubted complexity of this area (see commentary in *Adams on Criminal Law* at paragraph 72.05 and following referring to cases such as *R v Burrett and Others (No 2)* HC WN T3347/02 13 February 2003; *R v B (No 5)* HC CHCH T19/01 7 September 2001; *R v Yen* [2007] NZCA 203).

[80] The issue of whether what a charged person has done constitutes an attempt involves an often difficult assessment as to whether an act is sufficiently proximate to constitute an attempt. That is, whether the conduct in question is sufficient in law to amount to an attempt – whether it goes beyond mere preparation and constitutes the necessary substantial step towards the commissioning of the offence (see *Police v Wylie* [1976] 2 NZLR 167 and cases cited above at [81]).

[81] Here, in my judgment, Bryant Holdings’ actions can properly be characterised as a substantial step in the commissioning of the offence. Its actions were more than merely preparatory. The construction of the stopbank without notice to the Council was, as a matter of fact, a substantial undertaking and, in terms of the elements of the offence (questions of intent and the subsequent obtaining of resource consent aside), required only the water levels of the Pelorus River to rise for the offence to be completed. On that basis, I conclude that what Bryant Holdings did in constructing the stopbank was sufficient, at law, to constitute the actus reus of an attempt to divert the Pelorus River.

[82] Bryant Holdings had, in fact, done all that was necessary for it to do for the offence to be completed. In order for the offence to actually occur, all that was required was for there to be sufficient rain to raise the levels of the Pelorus River so that the stopbank came into play. There was no further step which Bryant Holdings could have taken to bring about that natural event.

[83] That analysis is, I think, consistent with the approach taken by the Court of Appeal in *R v Yen* (supra). To adopt this approach is not to suggest that a “last act” test should be adopted as the sole test to determine whether conduct is sufficient to amount to an attempt. Nevertheless, in certain circumstances such an approach will recognise acts that should be classified as attempts. In my view the last act test can be a sufficient, even if not a necessary, basis for attempts of liability, as acknowledged by Simester and Brookbanks *Principles of Criminal Law* (3 ed 2007) at 233.

[84] Taking the necessary elements of mens rea and actus reus together, in terms of the charge of attempting to divert the waters of the Pelorus River without a resource consent, in my judgment proof of the intent I have referred to at paragraph [72], together with proof of the fact of the construction of the stopbank by the appellant and of the lack of notice to the Council, are what is necessary to establish the elements of the offence with which the appellant is charged.

[85] On that basis, whilst the elements of actus reus were established, I am not persuaded the same conclusion can be reached as regards mens rea. I again conclude that the appropriate response to Bryant Holdings’ appeal is to remit the information for attempting to divert the Pelorus River without resource consent for rehearing in the District Court. That rehearing should be conducted on the basis of my findings in this decision.

Appeal as to sentence

[86] Mr Clark challenged both sentences as being manifestly excessive. He did so in general terms, and without reference to any particular similar case on the basis of which he could support his argument.

[87] Having considered a number of cases in this area – for example *Northland Regional Council v United Carriers Ltd* DC WHA CRN 04088500926-929 12 October 2005 and *Southland Regional Council v Houkura Company Ltd & Ors* DC INV CRN 1025007486-7-8 21 November 2001 – and in the absence of Mr Clark having provided me with any contrary authority, in my judgment he did not establish his proposition that the sentences imposed were, as he asserted, manifestly excessive.

[88] As there are to be rehearings of both Informations, I therefore restrict my comments on the sentence appeal to the following point. As Mr Clark noted, where there is a conviction for an attempt, s 311 of the Crimes Act 1961 provides that the maximum penalty is one half of the maximum penalty that would apply to the substantive offence. I draw this matter to the attention of the District Court Judge as, in terms of his approach to sentencing at the original hearing, this matter would appear to need consideration in terms of the relationship between any fine under s 9, if the substantive charge under s 9 is proven, relative to a fine for an attempt to commit an offence under s 14, if that charge is proven.

“Clifford J”

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