IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA239/2022
[2024] NZCA 9

BETWEEN	DAVID IAN HENDERSON Appellant
AND	ATTORNEY-GENERAL OF NEW ZEALAND Respondent

Hearing: 30 November 2023

Court: Courtney, Katz and Wylie JJ

Counsel: J Moss and C M Hanafin for Appellant
E J Watt and L E Kenner for Respondent

Judgment: 12 February 2024 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellant, David Henderson, faced three charges, all laid under the Insolvency Act 2006. Two of the charges were brought against Mr Henderson in

July 2015 and the third in July 2016. Mr Henderson seeks to be tried before a jury of his peers. He claims that his reputation has been besmirched by the filing of the charges and that he has a right to a trial so that he can clear his name. Mr Henderson says that his desire to clear his name has been thwarted because, on 6 August 2020, Brendan Horsley, the then Deputy Solicitor-General (Criminal), acting pursuant to a delegation from the Solicitor-General, wrongfully stayed the proceedings under s 176 of the Criminal Procedure Act 2011.

[2] Mr Henderson brought proceedings seeking to overturn the Deputy Solicitor-General's decision to stay the proceedings. In the High Court, Edwards J dismissed Mr Henderson's challenge to the Deputy Solicitor-General's decision.[1] Mr Henderson now appeals against the Judge's decision. The appeal is opposed by the respondent, the Attorney-General.

Background

[3] At all relevant times, Mr Henderson was a property developer. He was however adjudicated bankrupt on 29 November 2010. As a bankrupt, Mr Henderson was unable to undertake certain business activities without the consent of the court or the Official Assignee.[2]

[4] In November 2013, the Official Assignee filed an objection to Mr Henderson's discharge from bankruptcy. The Official Assignee wished to conduct an examination into Mr Henderson's business affairs. The examination was set down to proceed on 6 August 2015.

[5] On 9 July 2015, just a few weeks prior to the examination, the Official Assignee filed two representative charges against Mr Henderson alleging that he had breached s 149(1)(a) of the Insolvency Act and thus committed an offence pursuant to s 436(1)(b) of that Act. The charges alleged that Mr Henderson, as an undischarged bankrupt, had failed to comply with s 149 of the Insolvency Act in that

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1 *Henderson v Attorney-General* [2022] NZHC 816 [High Court judgment].

2 Insolvency Act 2006, s 149(1)(a). Pursuant to ss 436–437, the maximum penalty for breaching s 149 is a term of imprisonment not exceeding two years.

he had directly or indirectly taken part in the management or control of two businesses without the requisite consents.

[6] Mr Henderson considered that the Official Assignee had given him permission to be involved in the management or control of the two businesses. Initially he sought adjournments without plea so that he could consider the preliminary disclosure that had been made. A preliminary adjournment was allowed but a subsequent request for a further adjournment was declined and not guilty pleas were deemed to have been entered on Mr Henderson's behalf under s 41 of the Criminal Procedure Act. At a case review hearing on 17 December 2015, Mr Henderson elected trial by jury, with the effect that the prosecution was then transferred to the Crown.

[7] On 25 July 2016, the Crown laid an additional charge against Mr Henderson. It alleged that he had knowingly made a false or misleading statement to the Official Assignee, contrary to s 440(1) and (2) of the Insolvency Act.[3] This charge related to an assertion alleged to have been made by Mr Henderson to the Official Assignee that he had not been employed for a number of years and for omitting to record income he had received.

[8] Also on 25 July 2016, Mr Henderson applied to have all three charges against him dismissed under s 147 of the Criminal Procedure Act.

[9] It is common ground that thereafter the proceedings had a convoluted procedural history. As Edwards J recorded in the High Court,[4] from July 2015 to December 2017 there were several pre-trial applications made by both Mr Henderson and the Crown, resulting in several hearings. Both the Crown and Mr Henderson sought oral evidence orders under s 90 of the Criminal Procedure Act; Mr Henderson sought further disclosure from the Crown; further particulars were directed; and there were admissibility issues in relation to some of the proposed evidence.

[10] A number of the applications were heard by Judge O'Driscoll in the District Court at Christchurch over a 13-day hearing (spanning many months over two

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3 The maximum penalty for breach of s 440 of the Insolvency Act is a sentence of imprisonment not exceeding 12 months or a fine not exceeding $5,000 or both.

4 High Court judgment, above n 1, at [9].

years). In a reserved judgment delivered on 11 December 2017, the Judge, inter alia, dismissed Mr Henderson's s 147 application.[5] He was satisfised that there was sufficient evidence for a jury to hear and determine the charges.[6]

[11] This however was not the end of the pre-trial applications. Mr Henderson made an application for further disclosure under s 30 of the Criminal Disclosure Act 2008 on 6 December 2017. The application sought to require the Ministry of Business, Innovation and Employment (MBIE) to disclose virtually all documents in its possession relating to Mr Henderson.

[12] Mr Henderson has had a lengthy history with the Official Assignee and there were some thousands of documents potentially involved. There were ongoing arguments about disclosure and, in August 2018, the Court appointed an amicus to review any material the Crown sought to withhold under s 16 of the Criminal Disclosure Act. Given the number of documents involved, a second amicus was appointed in July 2019 to assist with the review.

[13] The proceedings came before Judge Neave, also in the District Court at Christchurch, in September 2019. A transcript of that hearing has been prepared. Judge Neave expressed the following view:

> This case long went past any possible public benefit and any possible reasonable application of the Solicitor General's guidelines on prosecutions, months, if not years ago. The amount of money, taxpayer's money, that has been wasted on this case is astronomical but here we are.

In a minute issued on the following day, Judge Neave recorded as follows:[7]

> [9] … I can record I have asked [Crown counsel] to reflect with those instructing him as to the marginal utility of a continuation of this prosecution given the vast amount of State resources that will be expended before it comes to a conclusion ...

The Judge set the matter down for further call on 13 December 2019.

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5 *R v Henderson* [2017] NZDC 28038 at [174].
6 At [173].
7 *R v Henderson* DC Christchurch CRI-2015-009-6331, 17 September 2019.

[14] Following this hearing the prosecutor referred the file to the Solicitor-General for review.

[15] On 12 December 2019, the day before the callover, the Crown filed a memorandum recording that the Court had invited it to consider whether the proceedings should continue, having regard to public interest considerations. The memorandum advised that the review of the case had not then been concluded, but that a decision was expected to be made following a meeting proposed on 20 December 2019.

[16] As a result, the callover was adjourned.

[17] On 12 February 2020, the Deputy Solicitor-General advised Mr Henderson that he had asked the Crown to provide him with a synopsis of the litigation to date, that he had considered that synopsis, and that he had met with MBIE officials and with the Official Assignee. The Deputy Solicitor-General recorded his view that:

(a) there was sufficient evidence on which a properly directed jury could convict Mr Henderson of the charges he faced;

(b) as a result, the only matter that fell for consideration was whether there was a public interest in continuing the prosecution;

(c) the only factor that militated against continuing the prosecution was the length of time it had taken to get to trial;

(d) he was satisfied, on the then timeline, that the delay could not be attributed to one factor alone; and

(e) the delay was not due to any failure by the Crown prosecutor to prosecute Mr Henderson's case in a timely manner.

The Deputy Solicitor-General concluded that, in his opinion, the case against Mr Henderson was sufficiently strong and serious that there remained a public interest in bringing the charges to trial.

[18] On 14 February 2020, the proceedings again came before Judge Neave. The Judge again expressed his concern about the charges proceeding to trial. In a transcript of the legal discussions before him, Judge Neave is recorded as saying as follows:

> … I have made my views of the efficacy of proceeding further on this pretty clear so I'm not going to say any more. … the [Solicitor-General] is obviously well aware of my views of the efficacy of this … We've got better things to be doing to be quite [frank] and judicial resources you will be well aware is an extremely scarce one so it will just have to take its course.

The Judge gave the Crown one month to, inter alia, provide a schedule to Mr Henderson listing the documents it had supplied to the amicae and the documents it had withheld together with the reasons for withholding them. The Judge made it clear that, as far as he was concerned, there would be no extension of time given. The matter was set down for further judicial monitoring to occur on 29 April 2020.

[19] On 25 March 2020, the country was placed into a "level four" lockdown to deal with the then current Covid-19 pandemic. MBIE employees were not permitted to be in MBIE's offices to progress the matter. Further the lockdown put significant pressure on the resources of the courts. Various hearings had to be postponed, including very many jury trials. Given these pressures, the Chief Justice and the heads of bench asked prosecutors to consider whether cases should proceed. As a result, the Deputy Solicitor-General reconsidered whether the prosecution of Mr Henderson should continue. He decided to issue a stay. He considered that:

(a) there was no realistic possibility of the charges being resolved within the following 12-month period;

(b) by the time a trial would be able to proceed, the delays in the case would be undue; and

(c) the prosecution was a relatively low priority jury trial, given the demands of responding to the pandemic, including on Government officials and the justice system.

The stay of the proceedings was issued on 6 April 2020. It directed that further proceedings against Mr Henderson in respect of the charges were stayed, pursuant to s 176(1) of the Criminal Procedure Act.

[20] In May and April 2020, the Solicitor-General and the Deputy Solicitor-General both exchanged email correspondence with Mr Henderson. They confirmed that the stay would not be lifted and that, in their view, it would be an abuse of process to do so given that one of the reasons for the stay was delay.

[21] In December 2020, Mr Henderson filed his proceedings. He sought a declaration that there had been a breach of s 25(a) of the New Zealand Bill of Rights Act 1990 and an order that the Attorney-General lift the stay. The proceedings were commenced as ordinary civil proceedings. However, in a joint memorandum filed in July 2021, both parties accepted that it would be more efficient if the proceedings were treated as an application for judicial review of the, by then former, Deputy Solicitor-General's decision to issue the stay. The matter proceeded to hearing before Edwards J on this basis on 8 November 2021.

The High Court judgment

[22] Edwards J noted Mr Henderson's assertion that he was "in limbo", because the prosecution of the charges had been stayed but the charges remained in place.[8] The Judge recited the factual background. She then discussed the nature of a stay under s 176 of the Criminal Procedure Act, primarily by reference to the High Court decision of *Rewa v Attorney-General*.[9] The Judge recorded that the effect of a stay is to forbid the taking of any further step in relation to the trial and that the proceedings are held in abeyance without an adjudication, but the charges remain in place.[10] She compared the effect of a stay with the effect of withdrawing charges under s 146 of the Criminal Procedure Act and of dismissing charges under s 147 of that Act.[11]

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8 High Court judgment, above n 1, at [1].
9 At [17]–[21], citing *Rewa v Attorney-General* [2018] NZHC 1005, [2018] 3 NZLR 233.
10 High Court judgment, above n 1, at [22].
11 At [25]–[26].

[23] The Judge recorded that a decision to stay proceedings is made by the Solicitor-General exercising the Attorney-General's law enforcement functions. She discussed the considerations required to be taken into account in deciding to exercise a stay, emphasising the Solicitor-General's Prosecution Guidelines.[12] She considered that a decision to issue a stay is reviewable, but commented that the standard of review is less settled.[13] She discussed relevant authority, including the decision of this Court in *Osborne v Worksafe New Zealand*.[14] The Judge adopted this Court's observations in *Osborne* and held that the considerations that apply to a decision to prosecute differ from the considerations that apply to a decision not to prosecute or to discontinue a prosecution. The Judge recorded that the standard of review is not as high in the latter situation as in the former, because a challenge to a decision not to prosecute or to discontinue a prosecution does not involve a collateral challenge to an active criminal proceeding and because judicial review is the only means by which redress may be sought for a such a decision. She also found that the grounds for review are broader for a decision not to prosecute or to discontinue a prosecution. The grounds can include relevancy/irrelevancy.[15]

[24] Applying these various matters, the Judge first considered whether there had been a breach of s 25 of the New Zealand Bill of Rights Act and whether the Deputy Solicitor-General had failed to take s 25 into account. She noted Mr Henderson's submission that the decision to issue the stay breached his fair trial rights under s 25 and the Crown's submission that s 25 was not engaged.[16] The Judge followed a decision of the High Court of Australia, *Jago v District Court of New South Wales*,[17] and found that s 25, in particular s 25(a) and (e), did not afford Mr Henderson a right to insist on the prosecution of his charges. She found that Mr Henderson's claim to the contrary could not succeed.[18]

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12 At [27]–[28].
13 At [33]–[34].
14 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 [*Osborne* (CA)]. The Supreme Court allowed the appeal against the decision of this Court: *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 [*Osborne* (SC)].
15 High Court judgment, above n 1, at [36]–[39].
16 At [42]–[45].
17 *Jago v District Court of New South Wales* (1989) 168 CLR 23 (HCA).
18 High Court judgment, above n 1, at [46]–[48].

[25] Further, the Judge did not consider that the Deputy Solicitor-General had failed to take into account mandatory relevant factors.

(a) She found it difficult to discern how a number of the factors raised by Mr Henderson in support of this ground fitted into the framework of judicial review, noting that the proceeding was not a general invitation to the Court to review the conduct of the litigation. The Judge said that, in any event, it was clear from email correspondence that the Deputy Solicitor-General did have regard to the history of the litigation in reaching his decision and that he also had regard to the complaints made by Mr Henderson about the conduct of the prosecution.[19]

(b) The Judge also found that the Deputy Solicitor-General had considered both dismissing the charges under s 147 and withdrawing the charges under s 146 of the Criminal Procedure Act. She did however record that it was not clear whether the Deputy Solicitor-General had considered the differences between a stay and a withdrawal of the charges from Mr Henderson's perspective. She noted the differences between the various options from a defendant's perspective and commented that, if the Attorney-General was considering the various options to terminate proceedings, the full legal effect of the options had to be weighed in the mix, including the effects of the various options on the defendant. The Judge however found that, to the extent there was an error of law, it was not an error which justified the grant of relief. She expressed the view that Mr Henderson had not produced any evidence to substantiate his claim that the Deputy Solicitor-General's decision had any social and financial consequences for him personally and observed that, in the absence of such evidence, she was unable to conclude that the legal and conceptual differences between a stay and a withdrawal of the charges had any material difference for Mr Henderson.[20]

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19 At [49]–[54].
20 At [55]–[62].

[26] Finally, the Judge dismissed Mr Henderson's argument that the proceedings had been stayed for an improper purpose and that irrelevancies had been taken into account. The Judge found that this challenge was without merit, that the Deputy Solicitor-General had explained the reasons for the change in his assessment of the public interest and that there was no reason to doubt the genuine nature of the assessment undertaken or to infer there were more nefarious reasons for the decision that was made. She did not accept that various matters referred to by Mr Henderson could give rise to an inference of improper purpose.[21] Nor did the Judge consider Mr Henderson should have been consulted by the Deputy Solicitor-General prior to the stay being issued. She held that the decision to issue the stay was for the Attorney-General alone and there was no duty to consult, nor to give Mr Henderson the opportunity to be heard.[22]

[27] Accordingly, she dismissed the application for judicial review.[23]

The appeal

The submissions for Mr Henderson

[28] Mr Henderson appealed Edward J's decision in three respects.

[29] First, it was submitted on Mr Henderson's behalf by Mr Moss that s 25(a) of the New Zealand Bill of Rights Act affords him the right to insist on prosecution of his charges at a trial and that the Deputy Solicitor-General failed to take this right into account. It was argued that the Judge placed too much weight on the observations of the High Court of Australia in *Jago*, that the passage relied on by the Judge was obiter and that it was not focused on a person's right to be heard once charged and once a prosecution has commenced. It was said that the right to a fair trial is not just about the trial itself, but also about the rights leading up to the trial, to ensure that an accused is protected during the entire criminal process. The effect of a stay was noted and it was submitted that, as long as the power to prosecute remains, Mr Henderson must be entitled to properly defend himself, because he remains charged with an offence which

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21 At [63]–[71].
22 At [72]–[74].
23 At [75].

has not been determined the one way or the other. It was put to us that the right to a public hearing is a fundamental right and that Mr Henderson's right to such a hearing has been thwarted by the Crown staying the prosecution. Reference was also made to s 24(e) of the Act and it was noted that two of the charges Mr Henderson faces carry a penalty of two years' imprisonment. It was suggested that, on a plain reading of the subsection, Mr Henderson is entitled to insist on a trial, so long as the charges are extant.

[30] The second ground of appeal asserted that the Judge failed to properly take into account relevant and mandatory considerations. It was submitted for Mr Henderson that the Judge's finding that the Deputy Solicitor-General took into account the different available options went too far — the options were considered only from the perspective of the prosecution and not from Mr Henderson's perspective. It was submitted that there is clear detriment to Mr Henderson from the fact that the charges have been stayed and that Mr Henderson did produce at least some evidence of that detriment. It was put to us that there was a material error made by the Deputy Solicitor-General in failing to consider the options from Mr Henderson's perspective and that, but for that error, the weighing of the various factors by the Deputy Solicitor-General may have been different. It was argued that once it was found that the error was material, Mr Henderson was entitled to relief. Indeed, Ms Hanafin, who argued this aspect of the appeal, went so far as to submit that it was not open to the Judge to refuse to grant relief in the circumstances of this case.

[31] The third ground of appeal challenged the Judge's finding that the decision to stay had not been made for an improper purpose. It was argued that the Judge erred in finding that there was no nefarious reason for the decision and that there was sufficient evidence to support the inference that the Deputy Solicitor-General was motivated by an improper purpose. Reference was made to the various observations made by Judge Neave and it was argued that it was difficult to accept that the decision to stay the proceedings was not, at least in part, driven by Judge Neave's evident frustration that the matter was ongoing and by the likelihood that it would end in a court-ordered stay.

[32] Mr Henderson sought an order setting aside the High Court judgment and granting the application for review and a declaration that, in staying the charges, the Attorney-General breached Mr Henderson's rights under s 25(a) of the New Zealand Bill of Rights Act. An order was also sought remitting the matter back to the Attorney-General for reconsideration.

The submissions for the Attorney-General

[33] Ms Watt and Ms Kenner for the Attorney-General submitted that the Judge was correct to dismiss Mr Henderson's claim. It was argued that the right to a fair and public hearing by an independent and impartial court contained in s 25(a) of the New Zealand Bill of Rights Act was not engaged and that the right is concerned with the trial process. Reference was made to *Jago*, to the fact that this decision has been adopted in subsequent decisions in the Australian Courts and endorsed by the Supreme Court in this country, and that the same approach has been adopted by the courts of England and Wales and by the European Commission on Human Rights. It was argued that once a decision is made not to proceed with a prosecution, there is no longer a charge to be determined which engages the right to a fair trial. Further and in any event, it was submitted that Mr Henderson's contention that he is in limbo and has no way to vindicate his presumed innocence is misconceived. It was argued that the Judge correctly held that Mr Henderson's right to be presumed innocent is unaffected by the stay and that, in practical terms, the stay will remain because the Solicitor-General has assured Mr Henderson that it will not be lifted and because it would, in any event, be an abuse of process to pursue the prosecution afresh given the time that has elapsed.

[34] In regard to the second ground of appeal — the failure to take into account relevant and mandatory considerations — it was submitted that this ground must also fail. It was put to us that the Judge did not find that the Deputy Solicitor-General had failed to consider the impact on Mr Henderson of granting the stay; rather, she found that it was not clear whether or not the Deputy Solicitor-General had considered this issue. It was argued that the Deputy Solicitor-General did consider the impact on Mr Henderson of imposing the stay and, given that the Deputy Solicitor-General had earlier considered that there was sufficient evidence to prosecute Mr Henderson, it was

that impact that was determinative. In any event, it was noted that there are no express mandatory relevant considerations set out in s 176 of the Criminal Procedure Act and that the breadth of permissible considerations in exercising the discretion is wide. It was submitted that the overarching consideration must be the public interest and that it is difficult to see how the impact of alternative options for bringing an end to proceedings on an individual defendant can be "truly mandatory" considerations. It was submitted that the Deputy Solicitor-General properly considered the public interest when deciding to stay the proceedings, including the impact on Mr Henderson of the delay that had occurred. It was also argued that the Judge was correct to find that even if an error of law was made, no relief was justified because there was no evidential basis on which to conclude that the differences between a stay and a withdrawal of the charges would have made a material difference to Mr Henderson.

[35] The third ground of appeal — improper purpose — was dealt with relatively briefly. It was argued that the Judge's assessment of the merits of this ground was correct and that there was no proper basis on which to challenge the veracity or validity of the reasons given by the Deputy Solicitor-General for staying the proceedings.

[36] It was submitted that the decision to issue the stay was lawful and an appropriate exercise of the prosecutorial discretion.

Analysis

The nature of the Attorney-General's power to stay criminal proceedings

[37] Relevantly, s 176 of the Criminal Procedure Act provides as follows:

> **176 Stay of proceedings**
>
> (1) The Attorney-General may, at any time after a person has been charged with an offence and before judgment is given, direct that the proceedings be stayed.

(2) If a direction is given under subsection (1), the relevant proceedings are stayed.

…

[38] The section consolidates and carries over, largely unchanged, s 77A of the Summary Proceedings Act 1957[24] and s 378 of the Crimes Act 1961.[25] The section does not create the power to direct a stay. It instead provides statutory confirmation of the Attorney-General's common law power to enter a nolle prosequi (not willing to proceed).[26]

[39] A stay does not amount to a dismissal of a charge or an acquittal. Rather, a stay forbids the taking of any further steps in relation to the charge. It is not an adjudication on whether the defendant is or is not likely to be found guilty and it can be entered for reasons wholly unassociated with that question.[27] A stay does not, of itself, create a bar to a subsequent suit.[28]

[40] The nature of the Attorney-General's power to enter a stay (or nolle prosequi) was considered in some detail in *Daemar v Gilliand*.[29] It derives from the Royal prerogative.[30] The Attorney-General can enter a stay of criminal proceedings in the public interest.[31] While the Attorney-General is a Cabinet Minister, by convention he or she exercises independent judgment in the law officers role; the Attorney-General must discharge the office independently of party political considerations and is not bound by collective responsibility when doing so.[32] Independence from political

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24 Repealed by s 7(2) of the Summary Proceedings Amendment Act (No 2) 2011 (2011 No 94). Section 77A related to a stay for summary or indictable matters prior to committal.

25 Repealed by s 6 of the Crimes Amendment Act (No 4) 2011 (2011 No 85). Section 378 related to a stay for indictable matters post-committal.

26 *Rewa*, above n 9, at [20]. See also Simon France (ed) *Adams on Criminal Law – Procedure* (online ed, Thomson Reuters) at [CPA176.01].

27 *R v Glover* [2010] 2 NZLR 698 (HC) at [23], citing *D v R* HC New Plymouth T 3/96, 24 September 1997 at 5–6.

28 *Rewa*, above n 9, at [25]–[33]; *Broome v Chenoweth* (1946) 73 CLR 583 (HCA) at 599 per Dixon J; and *R v Swingler* [1996] 1 VR 257 at 265–266.

29 *Daemar v Gilliand* [1979] 2 NZLR 7 (SC) at 27. See also *Rewa*, above n 9, at [18].

30 *Daemar v Gilliand*, above n 29, at 27. See also *R v Wilkes* (1768) 97 ER 123 (KB) at 125; and see also L J King "The Attorney General, Politics and the Judiciary" (2000) 29 UW Aust L Rev 155 at 155–158.

31 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [19.4.2(11)(a)].

32 Cabinet Office *Cabinet Manual 2017* at [4.4]; and see Joseph, above n 31, at [10.5.4(3)].

direction of prosecutorial decision-making is established constitutional practice in this country.[33]

[41] In practice, it is the Solicitor-General who exercises the Attorney-General's law enforcement functions. The Solicitor-General is an independent Crown appointee and head of the Crown Law Office; the Solicitor-General stands in the shoes of the Attorney-General when decisions are made to bring or stay prosecutions. The Solicitor-General exercises original rather than delegated authority and may exercise any of the functions or powers of the Attorney-General which devolve by operation of law. The Solicitor-General may also, with the Attorney-General's consent, delegate the exercise of such function or powers to a Deputy Solicitor-General.[34]

[42] It was previously held that the Attorney-General's decision to stay proceedings was not susceptible to judicial review.[35] The courts have more recently departed from these authorities and it is now clear that the fact that the power derives from the Royal prerogative no longer circumscribes judicial review. The exercise of the prerogative power of entering a stay is not immune from challenge.[36]

[43] In the present case the Attorney-General accepted that the Deputy Solicitor-General's decision to stay the proceedings against Mr Henderson under s 176 of the Criminal Procedure Act was amenable to judicial review, albeit that it is appropriate to exercise restraint in relation to the scope and standard (or intensity) of review.[37] This concession was consistent with the judgment of this Court in

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33 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [29].

34 Constitution Act 1986, ss 9A and 9C.

35 Joseph, above n 31, at [19.4.2(11)(a)], [19.5.1(1)], [19.5.2(1)] and [19.5.2(2)]; *Rewa*, above n 9, at [34]–[39]; *Daemar v Gilliand*, above n 29, at 29; and see *Amery v Neazor* [1987] 2 NZLR 292 (CA) at 293.

36 *Counsel of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 per Lord Diplock and at 419 per Lord Roskill; and *Burt v Governor General* [1992] 3 NZLR 672 (CA) at 678.

37 *Osborne v Worksafe New Zealand* (CA), above n 14, at [35]; and see Christopher Corns "Prosecution Accountability and Judicial Review" (2022) 53 VUWLR 1 at 17–18.

Osborne. The Court there listed six reasons for the exercise of judicial restraint when a prosecutorial discretion is challenged.[38] These include:

> (a) the importance of observing constitutional boundaries, including the Executive's role in deciding whether to prosecute, and the Courts' role in ensuring the proper and fair conduct of trials;
>
> (b) the high content of judgment and discretion in prosecutorial decisions;

This Court's decision was appealed to the Supreme Court. The appeal was allowed but the Supreme Court did not disagree with this Court's discussion of these principles.[39]

[44] We consider that the Attorney-General's concession was appropriate. The Deputy Solicitor-General's decision to order the stay was amenable to judicial review. Restraint, however, is appropriate and the threshold for review is high. By way of example, we note that the procedural protections of natural justice do not apply and there is no requirement that the defendant involved be given an opportunity to be heard before a stay is entered.[40] Nor is there a general obligation to provide reasons for a stay, except where exceptional circumstances so require.[41]

[45] Against this background, we turn to consider each of the issues raised by this appeal.

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38 *Osborne* (CA), above n 14, at [34]. See also *R v Director of Public Prosecutions, Ex Parte Manning* [2001] QB 330 at [23]; and Joseph, above n 31, at [19.4(11)(a)].

39 *Osborne* (SC), above n 14, at [19].

40 *Daemar v Gilliand*, above n 29, at 30.

41 *Director of Public Prosecutions*, above n 38, at [32]–[33]; and *Jordan v United Kingdom* [2001] ECHR 24746/94 at [122].

Does Mr Henderson have the right to insist on prosecution of the charges laid against him?

[46] Mr Henderson asserts that he has the right to insist on the prosecution of the charges laid against him. He relies on s 25 of the New Zealand Bill of Rights Act. It provides as follows:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
>
> (b) the right to be tried without undue delay:
>
> (c) the right to be presumed innocent until proved guilty according to law:
>
> (d) the right not to be compelled to be a witness or to confess guilt:
>
> (e) the right to be present at the trial and to present a defence:
>
> (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
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> (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
>
> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
>
> (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

[47] Mr Henderson relies primarily on s 25(a) and (e).

[48] We do not accept Mr Henderson's submission.

[49] We agree with the Attorney-General that s 25 is primarily concerned with ensuring a minimum quality of trial process and preventing conviction other than in accordance with that process. We accept that the right to a fair and public hearing by

an independent and impartial court is an absolute right,[42] but, in its terms, the s 25 rights apply to the "determination" of the charge or charges the defendant faces. Where there is a stay, there is nothing to be determined.

[50] Here the stay has been entered and the Solicitor-General has undertaken to Mr Henderson that the charges will not be revived. Consequently, Mr Henderson has ceased to be affected by them. There are no longer any extant charges against him which require determination. As a result, s 25 is no longer engaged.

[51] This is the view which has been reached by the European Commission of Human Rights, when considering the nature of fair trial rights affirmed by art 6 of the European Convention on Human Rights — the equivalent of s 25 of the New Zealand Bill of Rights Act. The Commission has accepted that art 6 does not provide an accused person with a right of access to the courts in order that a criminal charge against him or her be heard at a time of his or her choice. Where the prosecution has undertaken not to seek a trial, this is tantamount to the prosecution saying that the charges have been dropped. Consequently, the accused has ceased to be affected by the charges and there are no longer any charges against the defendant which require a determination within the meaning of art 6 of the convention.[43]

[52] The same conclusion has been reached in England and Wales.[44] Lord Bingham, for the House of Lords, has held that it is inescapable that a criminal charge has ceased to exist when a firm decision has been made not to prosecute. He observed that, for good and understandable reasons, the protection given to criminal defendants by art 6 covers not only the trial itself but extends back to the preparatory and preliminary processes preceding trial and forward to sentence and appeal. He nevertheless observed as follows:

> [12] … the primary focus of the right is the trial itself, because that is the stage at which guilt is decided with the possibility of condemnation and punishment. I find it hard to see how a criminal charge can be held to endure once a decision has been made that rules out the possibility of any trial, or condemnation, or punishment.

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42 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 (SC) at [77].

43 *X v United Kingdom* (1979) 17 DR 122 at [66]–[68].

44 *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 1 WLR 1184 at [12], referring to *X v United Kingdom,* above n 43.

[53] Similarly, the High Court of Australia in *Jago* held as follows:[45]

> The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law. As a matter of ordinary language, it is customary to refer in compendious terms to an accused's "right to a fair trial". I shall, on occasion, do so in this judgment. Strictly speaking, however, there is no such directly enforceable "right" since no person has the right to insist upon being prosecuted or tried by the State. What is involved is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.

[54] It was argued for Mr Henderson that the Judge's reliance on *Jago* was in error, because the High Court of Australia's comments were obiter and made in a different context.

[55] We do not consider that these are valid criticisms. *Jago* concerned an application to the court for a stay of proceedings which had earlier been declined. The power of the court to grant a stay to prevent an abuse of process was in issue. In the High Court, Edwards J acknowledged, and we accept, that the issue was therefore different to that at the heart of Mr Henderson's case.[46] Nevertheless, the obiter observations made in *Jago* are on point and the differences in context are, in our view, irrelevant.

[56] It is noteworthy that:

(a) *Jago* is consistent with the views expressed in the European Commission on Human Rights and in the courts in England and Wales, as noted above at [51]–[52];

(b) the passage in *Jago* has been endorsed by the New Zealand Supreme Court in *R v Condon*, in the context of discussing the absolute nature of fair trial rights under s 25 of the New Zealand Bill of Rights Act;[47] and

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45 *Jago,* above n 17, at 56–57.
46 High Court judgment, above n 1, at [46].
47 *Condon*, above n 42, at [77].

(c) the passage in *Jago* has been adopted in subsequent decisions of the Australian courts.[48]

[57] Here, the charges against Mr Henderson have been stayed and there is no prospect of them being revived. There are no longer any charges requiring a determination within the meaning of s 25. Mr Henderson's reliance on s 25(a) is, in our view, misplaced.

[58] For completeness, we record our view that s 24(e) of the New Zealand Bill of Rights Act does not support Mr Henderson's argument. That provision relevantly provides as follows:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> …
>
> (e) shall have the right … to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and
>
> …

[59] As can be seen, there is a right to trial by jury for offences with a penalty of two or more years' imprisonment. This is a safeguard for defendants and reflects the traditional view of the value in a jury trial. The right is however concerned with the nature of the trial where a prosecution is pursued in respect of qualifying offences. It does not confer the right to demand a trial in respect of charges that are stayed.

Did the Judge fail to take into account mandatory relevant considerations?

[60] Mr Henderson submitted that the Judge erred in finding that the Deputy Solicitor-General's failure to consider the impact on Mr Henderson of granting the stay was not an error of law which justified the grant of relief.

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[48] See for example *Commission of Corrective Services v Liristis* [2018] NSWCA 143, (2018) 358 ALR 741 at [67] per Basten JA; *James v R* [2013] VSCA 55, (2013) 39 VR 149 at n 86; and *Kyriacou v Police* [2007] SASC 341 at [66].

[61] Two of us agree with the Crown that the Judge did not find that the Deputy Solicitor-General failed to consider the differences between a stay and withdrawal of the charges from the perspective of Mr Henderson when making the decision to issue a stay; rather, the Judge found that it was not clear whether or not the Deputy Solicitor-General had considered the differences from Mr Henderson's perspective. One of us, Courtney J, is not persuaded that there is necessarily a difference between the two findings attributed to the Judge, but agrees that it makes no difference for the reasons which follow.

[62] As we noted above at [40], the discretion to order a stay must be exercised in the public interest. There are no express mandatory relevant considerations set out in s 176 of the Criminal Procedure Act, and the breadth of permissible considerations in exercising the discretion is wide.[49]

[63] The differences between a stay under s 176, a withdrawal under s 146, and a discharge under s 147 are clear. A prosecutor can, with leave, withdraw a charge before trial,[50] but the withdrawal is not a bar to any other proceeding in the same matter.[51] In contrast, a dismissal of a charge by the court under s 147 is a deemed acquittal,[52] and a plea of previous acquittal is available in the event of subsequent proceedings being brought in relation to the same charge or charges.[53]

[64] It is clear from email exchanges that the Deputy Solicitor-General had regard to the history of the litigation in reaching his decision to stay the proceedings against Mr Henderson. He also had regard to complaints raised by Mr Henderson about the conduct of the prosecution. We are also satisfied that the Deputy Solicitor-General was aware of the other options for concluding the prosecution of Mr Henderson.

(a) In an email sent to Mr Henderson on 27 March 2020, the Deputy Solicitor-General recorded that he was reconsidering, with

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49 *Osborne* (CA), above n 14, at [45].
50 Criminal Procedure Act, s 146(1).
51 Section 146(2).
52 Section 147(6).
53 Section 47.

advice from MBIE and the prosecutor, what options there were for concluding the matter.

(b) The Judge asked the Deputy Solicitor-General, in the course of his viva voce evidence, whether he considered whether or not to withdraw the charges. The Deputy Solicitor-General answered as follows:

> A. … yes, again … it was in the back of my mind because it's something I have made decisions on multiple times throughout my career. I've stayed all sorts of prosecutions, most of them more serious than this quite frankly. And in a situation where both the prosecutor and the original informant [MBIE], or the Official Assignee, had still indicated that they were somewhat keen on proceeding with the prosecution, then I've always thought that it is a mistake to direct the prosecutor to actually terminate the prosecution. The option that was available there would have been to withdraw the charges under s 146, that has no different effect and in fact that doesn't terminate a [proceeding]. For instance, a private prosecution could be brought or something like that. If the [Solicitor-General] has been asked to intervene, then my view on that is that if it's an option between a s 146 withdrawing of charges or the Solicitor General staying the charges, that's a better approach. Under s 147, the prosecutor could have been directed to dismiss the charges or apply for dismissal of the charges. That would have entailed the prosecutor actually effectively offering no evidence. And the circumstances that I considered also that the evidence was available. My thinking was that that was not the best option. When a prosecution has been stayed because there's a public interest in stopping it, it's best that that comes from the [Solicitor-General].

The Deputy Solicitor-General's answer shows that regard was had to the various options available at the time. It is clear that the Deputy Solicitor-General took them into account, albeit not expressly from Mr Henderson's perspective.

[65] Notwithstanding the Judge's observation,[54] we are not persuaded that a defendant's interests in the consequences of the various options are a mandatory consideration. As we observed above, there are no mandatory considerations set out in s 176 and the overriding consideration is the public interest. This is consistent with the position noted above at [44] — there is no requirement that the defendant involved be given an opportunity to be heard before a stay is entered. That the defendant does

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54 High Court judgment, above n 1, at [61].

not have the right to be heard counts against there being any obligation to take the defendant's perspective into account.

[66] Factors bearing on the public interest are found in the Solicitor-General's Prosecution Guidelines.[55] In broad terms, the guidelines require that a prosecution ought to be initiated or continued only where the prosecutor is satisfied first that the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction and secondly, prosecution is required in the public interest.[56] It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Rather, prosecutors must exercise their discretion as to whether prosecution is required in the public interest.[57] The public interest test is based on the broad presumption that it is in the public interest to prosecute where there has been a contravention of the criminal law.[58] In some instances where the case is serious, the presumption is "a very strong one".[59] It is recognised however that prosecution resources are not limitless. It is also recognised that there will be circumstances where, although the evidence gives a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest.[60] The guidelines set out an illustrative list of factors which can be relevant to any prosecution and factors that can tell against a prosecution.[61]

[67] The guidelines record the common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution.[62] It is noted that generally, the power to enter a stay can be exercised in three situations:[63]

(a) where a jury has been unable to agree after two trials;

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55 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).
56 At [5.1].
57 At [5.5].
58 At [5.7].
59 At [5.7].
60 At [5.7].
61 At [5.8]–[5.11].
62 At [25.1].
63 At [25.3].

(b) if the Solicitor-General is satisfied that the prosecution was commenced wrongly or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust; and

(c) to clear outstanding or stale charges or otherwise to conclude unresolved charges.

It is further recognised that the possible circumstances which can justify a stay are variable and that, in general terms, the same considerations apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution should not be continued where its continuance would be oppressive or otherwise not in the interests of justice.[64]

[68] In our view, the public interest (and, as an aspect of the public interest, whether it would be oppressive or otherwise not in the interests of justice to continue the prosecution) is the only mandatory consideration when considering whether or not to grant a stay. It may be appropriate to consider the individual interests of a particular defendant in some cases, but those individual interests are not of themselves mandatory considerations.

[69] In Mr Henderson's case, both a District Court Judge and the Deputy Solicitor-General concluded that there was sufficient evidence on which a properly directed jury could convict. What was relevant was the delay in getting the matter to trial. The length of time it had already taken to get the prosecution ready for hearing, the fact that there were still pretrial matters outstanding, the intervention of the Covid-19 pandemic, the resulting stresses on the courts and in particular on the criminal courts, the likely delay until trial, the impact of that delay on Mr Henderson and the relatively trivial nature of the charges, were all matters which were properly taken into account by the Deputy Solicitor-General in considering the public interest. There is in our view nothing to suggest that the Deputy Solicitor-General failed to take into account relevant considerations or took into account irrelevant considerations. This ground of appeal must also fail.

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64 At [25.4].

Was the decision to stay the proceedings made for an improper purpose?

[70] Mr Henderson repeated before us his argument before the High Court. He argued that the decision to issue a stay was made so that the Crown could avoid criticism, public shaming and embarrassment from the way in which the prosecution had been conducted.

[71] We are readily satisfied that there is no proper basis for these assertions. The suggestion was firmly rejected by the Deputy Solicitor-General in his evidence at trial, when he was cross-examined by Mr Henderson. We note the following passage:

> **THE COURT [TO MR HENDERSON]:**
>
> … you just want to know whether Mr Horsley is aware that at the time he made the decision the prosecution had been ordered to deliver documents in one [month's] time. Is that fair?
>
> **MR HENDERSON:**
>
> Sure, I'm happy with that question, Ma'am.
>
> **CROSS-EXAMINATION CONTINUES: MR HENDERSON**
>
> A. I think I was.
>
> Q. Because Mr Zarifeh [the then Crown solicitor in Christchurch] had told you, hadn't he?
>
> A. I honestly can't recall whether he'd told me about the further court orders.
>
> Q. So you can't recall then whether or not the fact that the Crown had completely failed to meet that court order was prevailing on you at the time you made your decision to stay this prosecution?
>
> …
>
> A. No.
>
> **CROSS-EXAMINATION CONTINUES: MR HENDERSON**
>
> Q. They weren't, all right. And Mr Zarifeh had reported to you, hadn't he, following the February 14 hearing, that the Court had further expressed their displeasure at [how] the Crown was conducting this prosecution?
>
> A. I don't recall that at all.
>
> Q. So the fact that the Court was frustrated with you, the fact that the Court – that you had failed to meet completely the court orders that

were made on the 14th of February played no part in you considering your stay.

A. So the simple answer is no. I cannot consider at all the Judge being frustrated or considering that we had failed in our obligations as prosecutors.

…

[72] There is no reason to question the Deputy Solicitor-General's evidence and we accept the same. The third ground of appeal cannot succeed.

Result

[73] The appeal is dismissed.

[74] The appellant must pay costs to the respondent for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

Solicitors:
Canterbury Legal, Christchurch for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent