IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 91/2019
[2019] NZSC 138

BETWEEN	PAUL NEVILLE BUBLITZ Applicant
AND	THE QUEEN Respondent

SC 92/2019

BETWEEN	BRUCE ALEXANDER MCKAY Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, Glazebrook and Ellen France JJ
Counsel:	W P Jeffries for Applicant in SC 91/2019 D H O'Leary for Applicant in SC 92/2019 R K Thomson for Respondent
Judgment:	9 December 2019

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

Introduction

[1] The applicants, Mr Bublitz and Mr McKay, were convicted after a Judge-alone trial before Toogood J of charges of theft by a person in a special relationship, an

offence under s 220 of the Crimes Act 1961.[1] Mr Bublitz was convicted of four charges under s 220 (charges 10–13)[2] and Mr McKay was convicted as a party to three charges (charges 10–12). Their appeals against these convictions were dismissed by the Court of Appeal.[3] They seek leave to appeal to this Court.

Background

[2] The factual background is set out in detail in the Court of Appeal.[4] The summary which follows of the key points from that material will suffice for present purposes.

[3] Mr Bublitz had a property development business owned through various companies which were part of a group known as the Hunter Capital Group (Hunter). The various arrangements at issue at trial were put in place to take advantage of market conditions affecting commercial property developments in New Zealand after the 2008 global financial crisis (GFC). In particular, Mr Bublitz sought to take advantage of the Crown Retail Deposit Guarantee scheme to make his portfolio more attractive to investors. On the Crown case, the steps taken were a response to serious cashflow problems being experienced by Mr Bublitz's ventures in the wake of the GFC.

[4] The facts involve interaction between two companies which Mr Bublitz had effective control over during the period, Mutual Finance Ltd (Mutual) and Viaduct Capital Ltd (Viaduct). The Crown case was that Mr Bublitz knowingly misapplied public funds raised by Mutual through a series of transactions between Mutual and Viaduct which amounted to related party transactions under a deed of guarantee dated 8 December 2009 between Mutual and the Crown (Mutual Crown guarantee).[5] There were various requirements under the Mutual Crown guarantee relating to related party transactions which Mr Bublitz did not comply with. Its case against Mr McKay, who

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1 *R v Bublitz* [2019] NZHC 222 [Verdicts judgment].
2 Mr Bublitz was acquitted of a number of other charges.
3 *Bublitz v R* [2019] NZCA 364 (Gilbert, Wylie and Thomas JJ) [CA judgment]. The Court allowed Mr Bublitz's conviction appeal in part, setting aside convictions on charges 14 and 15 (making a false statement as a promoter in a prospectus, an offence under s 242 of the Crimes Act 1961). Mr Bublitz's appeal against sentence was allowed.
4 At [1]–[22].
5 As matters transpired, Mr Bublitz maintained a Crown guarantee for Mutual, but not for Viaduct.

was the Chief Financial Officer and Director of Viaduct at the relevant times, was that he knew all of the relevant details.

[5] The Court of Appeal explained that charges 10–12 related to a purchase by Mutual:[6]

> … from a company associated with Mr Bublitz, Viaduct Capital Ltd (Viaduct), of loans Viaduct had made to companies in the Hunter group … The Judge was satisfied these loan purchases were related party transactions because he found Mr Bublitz controlled both Mutual and Viaduct for the purposes of the Mutual Crown guarantee at the relevant times. The Judge found that the restrictions on related party transactions in the Mutual Crown guarantee were knowingly breached in respect of these transactions.

[6] The other charge, charge 13, concerned advances Mutual made to one of the Hunter group companies, Hilltop Ridge Farms Ltd. The Court of Appeal recorded that Toogood J was satisfied Mr Bublitz controlled both companies when "the advances were made and these also breached the related party transactions in the Mutual Crown guarantee".[7]

[7] The Crown case relevantly required attention to be given to the definition of "control" in the Mutual Crown guarantee. That definition was as follows:

> (f) *Control*: a Person ("A") is "controlled" by another Person ("B") if:
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> (i) A is a subsidiary of B under the law of incorporation of A or for the purposes of GAAP [Generally Accepted Accounting Practice]; or
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> (ii) B is able to exercise real or effective control, directly or indirectly, over A or over a material part of A's business or affairs (whether pursuant to a contract, an arrangement or an understanding, as a result of the ownership or control of securities or other interests in or issued by A, or otherwise) except where A is a natural person and B's control arises solely under an enduring power of attorney granted by A in favour of B.

[8] We interpolate here that the trial before Toogood J was the second trial for this matter, an earlier trial having been aborted on 10 May 2017 after nine months of

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6 At [2] (footnotes omitted).
7 At [3].

hearing.[8] After that trial, having considered expert evidence proposed to be called by the defence, the Crown elected not to call evidence on other charges relating to the same transactions. These other charges alleged breaches of the related party lending restrictions in a separate trust deed put in place by Mutual to protect its investors (the Mutual Trust Deed).[9] The applicants were acquitted on charges based on a breach of restrictions on related party transactions in another deed, the Viaduct Trust Deed.

[9] At trial, the Crown succeeded on just one of the two definitions of "control" relied on under the Mutual Crown guarantee, namely, that under (f)(ii) dealing with "real or effective control". Toogood J was not satisfied beyond reasonable doubt that Mr Bublitz had control of Viaduct in the sense of the first definition phrased in terms of GAAP.[10] The Judge considered the question under the second of the definitions was simply whether Mr Bublitz "actually exercised control" at the relevant times.[11] It was on this basis that Toogood J found that he did exercise control over Viaduct.

[10] As the Court of Appeal observed, these outcomes (including the dismissal of the charges relating to the Mutual Trust deed concerning the same transactions) were "explicable only on the basis that the definition of 'control' in the Mutual Crown guarantee was wider" than that in the Viaduct and Mutual Trust Deeds.[12] The Court continued:[13]

> Whether the appellants understood the breadth of the restrictions on related party lending in the Mutual Crown guarantee arising out of the extended definition of "control", and whether they participated in the transactions knowing they breached those restrictions, are issues lying at the heart of these appeals against their convictions.

[11] In the Court of Appeal the applicants argued the approach taken in the High Court to control was too vague and uncertain to amount to a requirement for s 220.

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8 A judgment to be delivered contemporaneously with this judgment deals with an application for leave to appeal by Mr Bublitz and one of the other defendants, Mr Morrison, in relation to various costs decisions concerning the aborted trial: *Bublitz v R* [2019] NZSC 139.

9 These charges were dismissed on 21 September 2016.

10 Verdicts judgment, above n 1, at [220]. Mr Bublitz was neither a shareholder nor director of Viaduct at the relevant times.

11 At [225].

12 At [10].

13 At [10].

Counsel for Mr Bublitz argued that the risk was that the approach taken led to uncertainty as to when someone might be found to be criminally liable.

[12] The Court of Appeal rejected this argument. It referred to *R v Whale* in which it was accepted a person must be able to identify readily the nature and scope of the obligation, the breach of which would amount to a criminal offence.[14] However, the Court of Appeal considered the concept of "control" in the Crown Mutual guarantee had an "absolute character" and was "sufficiently hard-edged to qualify as a requirement for the purposes of s 220".[15] Indeed, s 220 itself used the very word "control".[16]

[13] As to proof of Mr McKay's knowledge, the Court of Appeal noted his "important role in the acquisition of both Viaduct and Mutual and the subsequent administration of their operations".[17] The Court made the point that Mr McKay "took the lead throughout in considering related party issues under the applicable Trust Deeds and Crown guarantees for Viaduct and Mutual".[18] It found that Mr McKay "must have appreciated the breadth of the provision and its significance in the context of the proposed transactions between Viaduct and Mutual".[19]

[14] Further, the Court said that Mr McKay must have known from his working relationship with Mr Bublitz that he exercised "effective overall control by the time of the transactions" at the relevant times.[20] And, Mr McKay "must have been aware" that the transactions breached the terms of the Guarantee because he "more than anyone" had a "clear understanding of the exact financial position of the relevant entities" at the relevant times.[21]

[15] Finally, the Court of Appeal dismissed the appeal against the decision not to grant a stay of the proceedings.

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14 *R v Whale* [2013] NZHC 731 at [489].
15 CA judgment, above n 3, at [57].
16 At [57].
17 At [120].
18 At [120].
19 At [120].
20 At [121].
21 At [121].

Proposed grounds of appeal

[16] In this Court, Mr Bublitz and Mr McKay seek to argue first that in determining which of the two possible definitions of "control" to adopt in the Mutual Crown guarantee, the Court should have applied the principle of strict construction applicable to penal statutes.[22] On this basis, the applicants would argue that the GAAP definition of control should have been adopted. As matters stood, it is said the application of the criminal law was too uncertain. The applicants also challenge the respondent's submission that the proposed appeal would seek to re-open a point not challenged in the Courts below, namely, that Mr Bublitz had "real or effective control" of Viaduct at the relevant time. They maintain this remained a live issue.

[17] Second, the applicants wish to argue the Court of Appeal erred by not ordering a stay of proceedings given the delays involved.

[18] Finally, Mr McKay seeks to challenge the decision of the Court of Appeal upholding the Judge's findings he had the requisite knowledge.

Assessment

[19] The proposed appeal does not raise any question of general or public importance.[23] Putting to one side the strength or otherwise today of the presumption of statutory interpretation relied on by the applicants, the exercise here is not one of statutory interpretation but rather one of the construction of the Mutual Crown guarantee.[24] That is a question confined to the particular facts. Further, there is real force in the respondent's submission that leave to appeal should be declined on the basis the argument that the use of the word "or" in the definition in the Mutual Crown guarantee deed should be read as "and" has insufficient prospects of success. (It is not necessary to resolve the difference between the parties as to the scope of challenge brought in the Court of Appeal given these views.) Finally, the arguments based on a

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22 The applicants rely on *Sweet v Parsley* [1970] AC 132 (HL) at 149 per Lord Reid: "it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted". See also *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) at 81.

23 Senior Courts Act 2016, s 74(2)(a).

24 See discussion of the principle in Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 336.

lack of certainty were all evaluated by the Court of Appeal and nothing raised by the applicants calls into question that careful assessment.

[20] Whether a stay of proceedings should have been ordered is also a fact-specific inquiry. The Court of Appeal applied the principles in *Wilson v R*.[25] There is no challenge to those principles. The Court of Appeal noted there was no direct challenge to the correctness of the decision of Lang J declining to grant a stay prior to the beginning of the second trial.[26] Counsel for Mr Bublitz also acknowledged the second trial was a fair trial. It was against that background that the Court of Appeal found there was "no material change of circumstance" justifying revisiting the decision of Lang J.[27] Nothing raised by the applicants casts doubt on that conclusion. In addition, Mr Bublitz received a significant sentence discount because of the delay.

[21] Finally, in terms of Mr McKay's knowledge, as the respondent observes, there are concurrent factual findings on this point. Nothing raised by Mr McKay suggests this Court need revisit the point.

[22] For the same reasons, nothing raised by the applicants gives rise to the appearance of a miscarriage of justice.[28]

[23] The applications for leave to appeal are accordingly dismissed.

Solicitors:
Beca & Co, Auckland for Applicant in SC 91/2019
High Street Consultancy, Auckland for Applicant in SC 92/2019
Crown Law Office, Wellington for Respondent

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25 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
26 CA judgment, above n 3, at [43]. See *R v Bublitz* [2017] NZHC 2251.
27 At [44].
28 Senior Courts Act, s 74(2)(b).