IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-1276
[2023] NZHC 2279

BETWEEN	ANDREW BUTTLE, JAMES BUTTLE and PETER BUTTLE Applicants
AND	DISTRICT COURT AT AUCKLAND Respondent
AND	WORKSAFE NEW ZEALAND Second Respondent

Hearing: 10 August 2023

Appearances: S W B Foote KC, D Neutze and P Hawkins for Applicant
M J Hodge, S T M Forrest and K Nihill for Second Respondent

Judgment: 22 August 2023

JUDGMENT OF ANDERSON J

This judgment was delivered by me on 22 August 2023 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016.

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Registrar/Deputy Registrar

Solicitors:
Brookfields, Auckland

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Introduction

[1] Whakaari/White Island (Whakaari) is an active volcano situated on the east coast of the North Island. Since 1936, Whakaari has been owned by the Buttle family, most recently through Whakaari Trustee Limited (WTL). Until recently it was a popular tourist destination. On 9 December 2019, while 47 people were on the island, Whakaari erupted. A total of 22 people died and 25 were seriously injured.

[2] Peter, James and Andrew Buttle (the Buttles) were the sole directors of Whakaari Management Ltd (WML), a company established to manage Whakaari. WML entered into licence agreements with tourist operators for access to the island which included requiring operators to meet health and safety obligations. Following the eruption, the Buttles, WML and others, were charged under the Health and Safety at Work Act 2015 (HSWA). The Buttles were the only individuals charged. The trial commenced in the District Court at Auckland on 11 July 2023. After a break in the trial between 11 and 23 August 2023, it is due to conclude by the end of September 2023.

[3] The Buttles made two pre-trial applications to have the charges against them dismissed under s 147 of the Criminal Procedure Act 2011 (CPA) or the proceedings stayed. Judge E M Thomas in the District Court at Auckland declined the applications by way of two rulings: one on 18 October 2022[1] and the other on 30 May 2023[2] (the Rulings). The Rulings relate to the appropriate level of particularisation of the HSWA charges against the Buttles, and whether the charges should be dismissed or stayed on the basis of prosecutorial misconduct by the second respondent (WorkSafe)[3] and prejudice to the Buttles.

[4] The Buttles seek to judicially review these decisions. Five grounds of review are alleged: error of law; breach of natural justice; failure by the judge to take into account relevant considerations/taking into account irrelevant ones; error of fact; and unreasonableness. By way of relief the Buttles seek an order quashing the Rulings, an order that the charges are dismissed under s 147 CPA, and a declaration that the

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1 *WorkSafe New Zealand v Buttle* [2022] NZDC 20694 [October Ruling].
2 *WorkSafe New Zealand v Buttle* [2023] NZDC 10648 [May Ruling].
3 As is customary, the first respondent played no role in the proceeding.

Rulings were unlawful/invalid. During argument, Mr Foote KC for the Buttles accepted that the High Court could not dismiss charges under s 147 but contended the appropriate relief would be a stay of the proceeding. I will treat this as the relief sought. Alternatively, a direction is sought that the May Ruling be referred back to the District Court for reconsideration.

[5] The second respondent (WorkSafe) applied to strike out the proceeding and at the same time filed a statement of defence. Both the substantive matter and the strike out application were before me in an urgent half day hearing on 10 August 2023.

[6] Prior to the hearing, WorkSafe applied for leave to cross-examine Ms Philippa Couldwell, a Special Counsel at the applicants' solicitor's firm. This application was withdrawn at the hearing following a clarification as to the intended scope of Ms Couldwell's affidavit in support of the application.[4]

The threshold the Buttles need to meet

[7] The challenged decisions are pre-trial rulings made by a District Court Judge exercising their criminal jurisdiction. While these are amenable to review, the power to do so is exercised sparingly.[5] Judicial review will be appropriate "only in rare cases" where the "intervention of the High Court is imperative".[6] "[T]ruly exceptional circumstances" are required before judicial review will be entertained.[7]

[8] Underlying this restraint is that relief by way of judicial review will not be granted where an alternate remedy exists. Moreover, the CPA contains a calibrated scheme for pre-trial appeal rights, appeal rights by leave on questions of law, and matters that are instead dealt with by way of appeal against conviction.

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4 Mr Foote KC, for the Buttles, clarified that the affidavit was intended simply to outline steps taken by the Buttles to obtain an expert after May 2023 including updating the Court on steps undertaken after the statement of claim and initial supporting affidavit were filed. The relevance of this will be explained below.

5 *Auckland District Court v Attorney General* [1993] 2 NZLR 129 (CA) at 136.

6 At 136.

7 See *C v Wellington District Court* [1996] 2 NZLR 395 (CA) at 400; *Bennett v District Court of New Zealand* [2020] NZHC 1730 at [36].

[9] As stated by Simon France J in *DGN v Auckland District Court*:[8]

> [29] … Compelling reasons to step outside the legislative scheme [provided by the CPA] should be required, and a strike out to assess whether the test could be met would be appropriate. This firm stance is supported by the reality that the scheme reflected in the [CPA] affords all the opportunity a defendant needs to make appropriate challenges.
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> …
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> [31] The [CPA] also prescribes appeal rights. This Part of the [CPA] reflects a careful consideration of what appeal rights should exist pre-trial and post verdict. Second appeal rights are carefully prescribed. Judicial review should not be seen as a way to circumvent that scheme. Sections 215 and 217 identify the provisions concerning which a pre-trial appeal may be brought. Section 147 is not included but the matters which underlay the s 147 application can of course be revisited as part of a conviction appeal. Further, s 296 provides for question of law appeals and may be available pre-trial.
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> [32] … The use of judicial review as an alternative route carries significant potential to undermine this scheme, and is one of the reasons why, in my view, a compelling reason should now be required before judicial review is allowed.

[10] Notably the Judge includes here that matters underlying an application under s 147 can be revisited in an appeal against conviction.[9]

[11] These principles have since been applied in a number of High Court decisions relating to applications for judicial review of decisions including declining applications under s 147.[10] In *Angus v District Court* Clark J synthesised the position as follows:[11]

> (a) Judicial review of a District Court decision under s 147 of the Criminal Procedure Act is only appropriate in rare cases where, by reason of the nature of the error, the intervention of the High Court is imperative.

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8 *DGN v Auckland District Court* [2016] NZHC 3338; [2018] NZAR 137.

9 The Court of Appeal has since held that s 296 does not provide for an appeal against a question of law on a dismissal of a charge under s 147 (*D (CA716/2015) v R* [2016] NZCA 190 at [13]–[23] addressing a discharge pursuant to s 322 of the Children, Young Persons, and Their Families Act 1989). Section 296 does allow leave to appeal on a question of law on application to amend charges (*Linfox Logistics (NZ) Ltd v WorkSafe New Zealand* [2018] NZHC 583 at [22]–[26]).

10 See for example *Angus v District Court* [2017] NZHC 2879, [2018] NZAR 1804; *Bennett v District Court of New Zealand*, above n 7; and *Rider v District Court* [2021] NZHC 1967.

11 *Angus v District Court*, above n 10, at [23] (footnotes omitted).

(b) Even if an identifiable question of law, beyond sufficiency of evidence, is said to arise the power to review must be sparingly exercised and truly exceptional circumstances will be required.

(c) A remedy by way of judicial review is not to be made available where an alternative remedy exists. The Crimes Act 1961 contains a comprehensive statutory procedure erected for the just and expeditious disposal of indictable trials as does the Criminal Procedure Act 2011.

(d) Where Parliament has provided by statute appeal procedures it will only be in rare and exceptional circumstances that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.

(e) The policy factors weighing against disruption, delay and fragmentation of the criminal process through recourse to the High Court will not preclude judicial review of an error that has the potential to lead to serious injustice that cannot be corrected on appeal.

[12] Counsel agree that there is a threshold question of whether this is a sufficiently exceptional case where judicial review is appropriate. WorkSafe's strike out application is founded on the proposition that it is not. Because I have the judicial review application before me, I consider the threshold in the context of the substantive proceeding, rather than by determining the strike out application as a preliminary matter.[12] Mr Hodge for WorkSafe advised that he saw the strike out application as bringing the threshold question to the Court's and the Buttles' attention and had no objection to me proceeding in this way.

[13] For reasons that I will explain, I have concluded that the threshold for review is not met, and I dismiss the judicial review application on that basis.[13] In argument, Counsel agreed that in this event, I should constrain my findings to issues relating to the substantive review points so far as practicable. That is intended to limit making findings that might also be considered by a Judge in the event of an appeal, should the Buttles end up in a position where they are raising the same issues advanced in this review in an appeal against conviction on the District Court charge. The delineation of matters going to the threshold issue and those going to the substance is not always straightforward to retain, although I do this where I can.

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12 That avoids diversion into considering issues of the appropriate summary procedure. Refer *Gifford v District Court* [2021] NZHC 1258. In *Angus v District Court*, above n 10, the Court considered the threshold question in the substantive judicial review.

13 I record that I would have been prepared to strike out the claim on the same basis, relying on *DGN v Auckland District Court,* above n 9.

[14] In particular, Mr Hodge acknowledged that prosecutorial misconduct of a character that would justify a stay on the basis of the need to maintain the integrity of the justice system[14] could constitute a sufficiently exceptional case to intervene by way of judicial review. Therefore whether there was such conduct is something I need to address as a threshold issue. Together with the complexity of the background facts, this excuses the length of my decision.

Charges against the Buttles

[15] WML has been charged under the HSWA as a PCBU[15] under s 36(2) and s 37(1) of the HSWA. This is on the basis that WML's business involved the ongoing management of access to Whakaari, work which did not cease upon entry into licence agreements with operators. WorkSafe says WML could not contract out its obligations under the HSWA. Under s 36(2) WML is required to "ensure, so far as is reasonably practicable" that "the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking". Under s 37(1) a PCBU that manages or controls a workplace must "ensure, so far as is reasonably practicable" that "the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person".

[16] The Buttles have been charged under s 44 of the HSWA as officers of a PCBU. The obligation of an officer is to "exercise due diligence" to ensure that the PCBU complies with its obligations. As relevant, s 44 provides:

> (1) If a PCBU has a duty or an obligation under this Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.
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> (2) For the purposes of subsection (1), an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation) –
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> (a) the nature of the business or undertaking; and
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> (b) the position of the officer and the nature of the responsibilities undertaken by the officer.

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14 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37].

15 Section 17 defines this as "a person conducting a business or undertaking".

…

(4) In this section, **due diligence** includes taking reasonable steps –

(a) to acquire, and keep up to date, knowledge of work health and safety matters; and

(b) to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and

(c) to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

(d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information;

…

Talley's Group Limited v WorkSafe New Zealand (Talley's case)[16]

[17] In *Talley's Case*[17] the Court of Appeal addressed the appropriate particularisation of charges under the Health and Safety in Employment Act 1992, the predecessor to the HSWA.[18] It also addressed whether charges should be dismissed or stayed on account of a flawed charging practice by WorkSafe. I summarise *Talley's* case to give context to the present application because it featured prominently in the submissions before me and in the backdrop to the Rulings.

[18] WorkSafe charged Talley's Group Ltd (Talley's) with failing to take "all practicable steps"[19] to ensure the safety of its employee at work. This was a primary obligation on a business, now replaced with the wording "to ensure so far as is reasonably practicable" under s 36(2) and s 37(1) of the HSWA. In contrast, the

16 *Talley's Group Ltd v WorkSafe New Zealand* [2018] NZCA 587, [2019] 2 NZLR 198.

17 Talley's case involved a second appeal on a question of law from a District Court decision. That is, not a judicial review.

18 This is the predecessor to s 36(1) of the HSWA.

19 Section 6 provided: "Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to— …" By s 2A, "all practicable steps" was defined as: "in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to" various matters.

charges against the Buttles under s 44 of the HSWA require an officer to "exercise due diligence."

[19] Charges were filed against Talley's on 20 November 2015, one day before the expiry of the limitation period.[20] The charge alleged that Talley's "failed to take all practicable steps to ensure that [the worker] was not exposed to hazards arising out of the operation of a Yale forklift". This mirrored the wording of the basic statutory obligation. It gave no particulars of the practicable steps Talley's ought to have taken to ensure the safety of the victim of the work-based accident. On 1 December 2015, WorkSafe served Talley's with the charging document and a summary of facts. The latter set out the four practicable steps it was alleged Talley's had not taken.

[20] Talley's pleaded not guilty. An expanded list of omitted practicable steps was then provided in August 2016. Talley's applied to stay the proceeding or dismiss the charge on the basis that the August expansion was an evasion of the applicable time bar and so was an abuse of process.[21]

[21] The Court of Appeal held that the charge as framed was defective. It did not meet the requirement in s 17(4) of the CPA for Talley's to be fully and fairly informed of the substance of the charge.[22] The charge needed to include details of the practicable steps that WorkSafe alleged Talley's should have taken. These were the "very pith and essence" of the charge.[23]

[22] Talley's argued that this rendered the charge not just defective, but a nullity. Therefore, the charge could not be saved by s 379 of the CPA which provides that:

> No charging document … and no process of proceeding may be dismissed, set aside, or held invalid by any court by reasons only of any defect, irregularity, omission, or want form, unless the court is satisfied that there has been a miscarriage of justice.

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20 At [11]. The Health and Safety in Employment Act imposed a six month time limit from the date WorkSafe inspectors became aware of the incident from which charges must be filed.
21 At [17].
22 At [41].
23 At [41] applying *Police v Wyatt* [1966] NZLR 1118 (CA) at 1133.

[23] The Court of Appeal confirmed previous case law to the effect that the courts will be slow to reach the "drastic conclusion" that a charge is a nullity.[24] This would require defects so drastic as to deprive the document of its essential character.[25] That was not the case there, despite the charge simply mirroring the statute.[26] Because the charge was not a nullity and filed in time, it could not be said that the operation of s 379 would enable WorkSafe to improperly evade the time bar. The charge would be saved unless ignoring the defect would produce a miscarriage of justice.[27]

[24] The Court held that the particulars provided in the summary of facts accompanying service of the document on 1 December 2015 (after the time bar) gave Talley's sufficient notice and Talley's would suffer no miscarriage of justice. The defect was one of form only.[28]

[25] The Court accepted that Talley's could argue it would be prejudiced if required to respond to the more complex case in the August 2016 document.[29] Had WorkSafe applied to amend its particulars to include these, that late expansion may not have been permitted. However, any such prejudice could be addressed adequately by means other than invalidating the entire proceeding, which would be a disproportionate response. The Court amended the charging document using s 379 but the amendment was confined to the particulars set out in the summary of facts served on 1 December 2015.[30]

[26] The Court then addressed Talley's separate abuse of process argument. Talley's submitted that WorkSafe's approach of filing an unparticularised "holding charge" before the time bar expired and providing particulars later out of time was systemic, ie WorkSafe's standard charging practice. Talley's submitted that the Court

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24 *Hall v Ministry of Transport* [1991] 2 NZLR 53 (CA) at 57, as cited in *Talley's New Zealand Ltd v WorkSafe New Zealand*, above n 16, at [45].

25 At [45].

26 At [70].

27 At [71].

28 At [74].

29 At [75].

30 At [76]–[77]. The mechanism for amendment was not discussed. Compare *Civil Aviation v The Helicopter Line Ltd* [2017] NZDC 22210 at [13] where the Court said that the power under s 379 does not actually have the effect of specifying those particulars in the charging document but rather to remedy the defect the Court needs to have recourse to either s 18 or s 133 of the CPA.

should not abide by a systemic and cynical avoidance of statutory protections for defendants.[31]

[27] The Court emphasised that the discretion to stay for prosecutorial misconduct is not to be exercised lightly.[32] It referred to the two categories of abuse of process which may render a stay appropriate:[33]

(a) where the prosecutor's conduct renders a fair trial impossible; or

(b) where the prosecutor's conduct is of a kind so inconsistent with the purposes of criminal justice that proceeding with the trial would tarnish the court's own integrity or offend the court's sense of justice and propriety.

[28] The correct approach to a stay of proceedings in the second category was discussed in *Wilson v R.* The Supreme Court held:[34]

> [60] To summarise, when considering whether or not to grant a stay in a second category case, the court will have to weigh the public interest in maintaining the integrity of the justice system against the public interest in having those accused of offending stand trial. In weighing those competing public interests, the court will have to consider the particular circumstances of the case. While not exhaustive, factors such as those listed in s 30(3) of the Evidence Act will be relevant, including whether there are any alternative remedies which will be sufficient to dissociate the justice system from the impugned conduct. In some instances, the misconduct by the state agency will be so grave that it will be largely determinative of the outcome, with the result that the balancing process will be attenuated. The court's assessment must be conducted against the background that a stay in a second category case is an extreme remedy which will only be given in the clearest of cases.

[29] The Court of Appeal in *Talley's* case concluded:[35]

> [84] While it is a matter of concern that WorkSafe has adopted a flawed charging practice, we do not consider it to be so egregious as to undermine public confidence in the integrity of the judicial process.

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31 At [79].
32 At [80].
33 At [80] citing *Fox v Attorney-General*, above n 14, at [37].
34 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
35 Footnotes omitted.

> The practice has, it seems, continued unremarked upon by trial courts for some time …
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> [85] Of course, irregularity cannot be excused because it is commonplace. But it does support WorkSafe's contention that it did not realise its charging practice was impermissible. In any event, there is no suggestion of actual bad faith, and WorkSafe has now indicated that, the law having been clarified by Faire J (and this Court on appeal), necessary particulars will henceforth be provided, in time, and on the face of the charging document. As is made clear in *Wilson*, the sanction of a stay is primarily aimed at prospective correction in the case of systematic misconduct, and this must particularly be the case where the impugned conduct was in good faith. Relatedly, *Wilson* requires a balancing of the public interest in ensuring charging practices are not unlawful, and that in ensuring that those accused of offences stand trial. In the circumstances of this case and WorkSafe's (now former) charging practice, we have no doubt that the balance must fall on the side of bringing those accused of offences to trial.

[30] The Court of Appeal concluded that this was not one of the "clearest of cases" in which the "extreme remedy" of a stay could be justified.[36]

WorkSafe's Whakaari investigation process

[31] I now turn to the current facts.

[32] Immediately following the Whakaari eruption, WorkSafe commenced an investigation. It was of significant scale: I deal only with the matters relevant for this case.

[33] On 10 September 2020 the Buttles attended a compulsory interview with WorkSafe as representatives of WML. Then on 16 September 2020 the Buttles were invited to attend a voluntary interview with WorkSafe in their capacities as directors of WML. The Buttles declined. Through their solicitors they gave grounds for their decision:

> [The Buttles] have requested us to explain that unlike a corporate where the Board is generally separate from the executives, theirs is a closely held family concern in which the Board themselves are the executives, and WorkSafe has already conducted detailed interviews during September at which they were all present. They therefore are not aware of any additional information beyond that which they provided at the prior interviews which they could further provide.

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[36] At [86].

[34] The Buttles offered to consider written questions if WorkSafe required further information. WorkSafe did not take up this offer.

[35] On 21 October 2020, a WorkSafe report concluded that an investigation was unable to obtain adequate or sufficient information to establish whether the Buttles breached their duties as directors of WML under s 44 of the HSWA. On 16 November, the officer in charge of the investigation, Mr Mander, requested a legal review of the investigator's recommendations in respect of the Buttles. WorkSafe obtained an opinion from their solicitors.

[36] On 24 November 2020, WorkSafe sent letters to each of the Buttles alleging that they failed to exercise due diligence to ensure that WML had complied with its obligations. They gave the Buttles an opportunity to respond. The Buttles' solicitor replied on 27 November stating that the timeframe given for the Buttles to respond was unreasonable. The letter concluded that:

> We note that the allegations received by the WML Officers are closely related to those received by WML. In this regard due to the shortness of available time we refer WorkSafe to the response provided by WML in relation to the WML Allegation Letter while reserving all rights.

[37] Charging documents were filed on 30 November 2020 with the summary of facts shortly after on 8 December 2020. This is in context of the limitation period expiring on 10 December 2020.[37]

[38] The charging documents alleged that between 4 April 2016 and 10 December 2019, at Whakaari, each of the Buttles:

> Being an officer of a PCBU, namely Whakaari Management Limited, having a duty to exercise due diligence to comply with its duties as a PCBU, failed to comply with that duty, and that failure exposed any individual to a risk of death or serious injury arising from volcanic activity.
>
> **Particulars:**
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> [The defendant] failed to take the following reasonable steps:
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> 1. to acquire and keep up to date knowledge of work health and safety matters;

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[37] Health and Safety at Work Act 2015, s 146(1)(a).

2. to gain an adequate understanding of the hazards and risks associated with the PCBU permitting access to Whakaari;

3. to ensure that the PCBU had available for use and used appropriate resources to eliminate or minimise risks to health and safety from the PCBU permitting access to Whakaari;

4. to ensure that the PCBU had and implemented a process for complying with its duties or obligations under s 36(2) and/or s 37 of the Health and Safety at Work Act 2015.

[39] It is important to note that the four particulars closely mirror the wording of ss 44(4) (a), (b) (c) and (d) of the HSWA, set out earlier.[38] The Buttles emphasise that at the time charges were laid, WorkSafe had expert reports for all parties now before the Court except for the Buttles and the National Emergency Management Authority. The charges against the latter were subsequently dismissed under s 147 of the CPA.

Events following charges being laid

[40] Between 15 to 18 January 2021, WorkSafe instructed Dr Justin Ludcke to prepare a report on the role of the Buttles as officers of WML. Dr Ludcke had previously prepared a report on WML and WTL. His report on the Buttles individually was released on 3 February 2021.

Pre-October Ruling exchanges

[41] In October 2021, the Buttles' solicitors wrote to WorkSafe's solicitors relying on *Talley's* case to contend that the charging documents were defective[39] because they did no more than outline the words of s 44 of the HSWA. The Buttles requested that WorkSafe make an application to amend the charging documents under s 133 of the CPA and that if such an application was not made the Buttles would apply to have the charges dismissed under s 147.

[42] The Buttles referred to the conclusion in *Talley's* case that the charges there were able to be saved by s 379 of the CPA as the summary of facts provided the

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38 See [16] above.

39 Section 17(4) of the CPA provides: "A charge must contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence that it is alleged that the defendant has committed."

necessary particulars to give fair notice of allegations against it (but noted the Court was critical of that practice).

[43] The letter then went through the detail of the summary of facts under each head of the particulars of the charges against the Buttles. The Buttles said that the summary of facts would not save the charges here because (in contrast to the position in *Talley's* case) it too was insufficiently particular. As relevant to what later occurred, the Buttles' letter addressed the allegation that they had "failed to take ... reasonable steps to ensure that WML had available for use and used appropriate resources to eliminate or minimise risks to health and safety from the PCBU permitting access to Whakaari." The summary of facts alleged that the profit WML had made each year was not reinvested "into obtaining expert advice on how WML could ensure that guided tours of Whakaari were conducted safely". In respect of this, the Buttles said that the summary of facts did not allege precisely what expert advice should have been obtained.

[44] The Buttles' also referred to criticisms in *Talley's* case of WorkSafe's flawed charging practice and to WorkSafe's advice that it would be changing the practice. The Buttles asserted that WorkSafe had continued with the defective charging practice, said to be even more prejudicial here because there were no, or any, adequate particulars provided in the summary of facts. WorkSafe was alleged to have acted in bad faith and that the prosecution was an abuse of process.

[45] By their response on 4 November 2021, WorkSafe's solicitors did not accept that the charging documents were defective. They emphasised that *Talley's* case involved a duty to take "all practicable steps" whereas in s 44 there is a duty to "exercise due diligence".

[46] WorkSafe said that under s 44 there is a myriad of ways a defendant could comply with its obligation to exercise due diligence. The matters in s 44(4) (set out at [16]) were said to be a non-exhaustive list of reasonable steps that might be required for an officer to have exercised due diligence. The substance of the charge was conveyed to the Buttles by these steps particularised in the charging documents, despite mirroring some of the s 44(4) list. The letter drew a distinction between

particularising *what* a defendant is required to do to comply with a duty and *how* the defendant might do so, with *Talley's* case being an example of the former case.

[47] The letter stated under the heading "Summary of Facts".

> [16] Even if the charging documents were defective, such defect would be cured by reference to detail within the summary of facts, in accordance with the Court's decision in the *Talley's* case.
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> [17] In your letter, you state that the summary of facts "does not particularise any specific actions which WorkSafe says the Buttles should have taken". The charging documents and summary of facts both particularise the reasonable steps that the defendants should have taken. Rather, your criticism appears to relate to failing to particularise how the defendants should have taken those particular steps. For the reasons set out above, we do not consider that it is either appropriate or necessary, or consistent with the legislative scheme in HSWA, for WorkSafe to stipulate to a duty holder how it should comply with its duty. That obligation rests on the duty holder.
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> [18] We do however make one comment. The present case is concerned with an allegation of omissions. *That is, the allegation is not that the defendants took some due diligence steps, but they were inadequate – rather, the allegation as explained in the summary of facts is that they failed to take any reasonable due diligence steps. This explains the limited specificity in the summary of facts – further specificity is not possible given there are no specific actions taken by the defendants that can be identified.*
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> (Emphasis added)

[48] In preparation for the trial, WorkSafe approached Richard Gibson to provide expert evidence. The Buttles were informed of WorkSafe's intention to call Mr Gibson as opposed to Dr Ludcke as an expert witness on 14 December 2021. They were then served a copy of Mr Gibson's formal statement on 1 March 2022 of the evidence he intended to give.

[49] Mr Gibson's statement noted that as a small business without employees, the Buttles had dual roles in terms of governance duties and executive operational roles, and as such a higher duty applied compared with other workers. In a section titled "What did the Officers do", Mr Gibson set out certain steps taken by the Buttles, marshalled under each of the objectives in s 44(4). Steps taken include being involved

in meetings with EMBOP[40] and GNS[41], engaging GNS, and talking to WML's licensees about safety. Mr Foote characterised this as identifying some reasonable steps that were taken. As well as setting out under each head what steps were taken, the statement set out what steps ought to have been taken. Under the head of ensuring that WML had available and used appropriate resources, for example, the statement referred to various expert advice that it was said ought to have been obtained as well as certain risk analyses that should have been undertaken.

[50] The Buttles' solicitors wrote to WorkSafe on 8 March 2022 referring back to the 2021 communications. The Buttles alleged that the case raised in Mr Gibson's statement and now advanced by WorkSafe was completely different to the case, as outlined in the charging documents, that the Buttles failed to take "any reasonable due diligence steps". The Buttles asserted that the case against them had been "re-engineer[ed]" by means of Mr Gibson's statement. The Buttles also asserted that by introducing Mr Gibson's statement, WorkSafe was engaging in the exact sort of behaviour that the Court of Appeal had criticised in *Talley's* case by filing holding charges and creating a case after the statutory time limit. The Buttles alleged that there had been an abuse of process and asked for further information about the investigation. They confirmed their intention to apply to dismiss the charges.

[51] By letter dated 1 April 2022, WorkSafe's solicitors denied that the case against the Buttles had changed or that the charging documents were insufficiently particularised. The letter recorded that WorkSafe did not consider Mr Gibson's evidence was necessary to establish the facts relied upon to prove its case and it was not necessary for WorkSafe to have obtained his opinion before charging. Information responding to the Buttles' requests was provided.

[52] On 14 April 2022, the Buttles filed their first application for dismissal of the charges or a stay of proceeding under s 147 of the CPA. They asserted that the charging documents were defective in such a way that they could not be remedied; were therefore a nullity; and should be dismissed. Alternatively, they said that

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40 Emergency Management Bay of Plenty.
41 Geological and Nuclear Sciences.

continuing the proceedings, given the way the charging documents had been framed, would be an abuse of process warranting a stay or dismissal of the charges.

October Ruling

[53] In an oral ruling delivered on 18 October 2022 the Judge dismissed the Buttles' application.

[54] The Judge referred to s 17(4) of the CPA and the requirement that charging documents must contain enough particulars or details "to fully and fairly inform a defendant of the substance of the offence that they are alleged to have committed."[42]

[55] The Judge accepted that the charging documents contained only the statutory language and that other defendants "were provided much more detail".[43] Despite acknowledging that in some cases charges consisting only of the statutory language were deemed to be defective,[44] the Judge did not consider this was the case here. Specifically, the Judge said:

> [12] *Talley's* dealt with an examination of steps that were taken and steps that were not taken. So, particularising those steps was the pith and essence of that charge. The particulars here are not that the Buttles took some steps but not others, it is that they failed totally. Here the case against them is that no steps were taken. That is the pith and essence of the case against them, that is the pith and essence of these charges.
>
> …
>
> [16] The Buttles argue that as they are, the charging documents here do reverse the burden of proof. In other words, they claim that it places an obligation on the Buttles to show that they took some steps when ordinarily a defendant is not required to show anything. Maybe the Buttles might wish to show that, maybe they might not. But they do not have to, and the charge in its current form in respect of each of them does not change that. WorkSafe has said its allegations against the Buttles are that each of them did nothing. Ms McDonald went on the record to confirm that is WorkSafe's case. WorkSafe has, as a matter of record then, nailed its colours to the mast in that respect. The burden of proof does not require the Buttles to prove anything. It requires WorkSafe to prove that each of the Buttles has not exercised the necessary due diligence, in that they did nothing in respect of the four particulars identified in the charging documents. No doubt WorkSafe

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42 October Ruling, above n 1, at [2].
43 At [3].
44 At [3].

> has and will continue to give serious thought as to whether it can prove that.

[56] The Judge briefly addressed the remaining grounds of the Buttles' s 147 application (for dismissal due to the alleged defects or due to abuse of process). Rather than dismissing the charges, the Judge considered that the courts have generally "tried to find a way to remedy a defect in such a way that will allow a trial to fairly go ahead".[45] He considered that the evidence put forward by the Buttles fell "well short" of establishing any bad faith or improper motive on the part of WorkSafe that would justify a dismissal on grounds of abuse of process.

[57] The Judge also considered that had changes been required to the charges, with nine months until trial there would not have been any prejudice to the Buttles' fair trial rights.[46]

Transcript of hearing

[58] As outlined above, the Judge characterised the case as one where "no steps were taken" by the Buttles. The basis of this can be seen in exchanges the Judge had with Ms McDonald KC in argument as to WorkSafe's case against the Buttles:[47]

> MS McDONALD
>
> ...
>
> This is an omissions-based case and that is a fact that needs to be borne in mind …WorkSafe's position is there was a paucity of information and they stand – and WorkSafe stands and falls on the basis of that case. Their case is there was no material provided and it's an omissions-based case. There's no reverse onus arises, if the Buttles can come along and if WorkSafe's case fails then it fails. I'm not shying away from that, there's no suggestion that the onus – that we're putting an onus on the Buttles.
>
> THE COURT TO MS McDONALD:
>
> Q. Well that's fair enough if the WorkSafe position is that they took no steps, they did nothing. Based on what we don't see.
>
> A. No reasonable steps.

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45 At [18].
46 At [20].
47 The Judge also had an exchange with Mr Neutze for the Buttles where he put WorkSafe's position in similar terms and described the Buttles in a good forensic position as a result.

Q. In the WML, took no reasonable steps because we don't see any evidence of anything and here's how we can prove that if there had been any evidence of anything we would've seen it, right?

A. That is the case.

Q. That's effectively the case so if you go then to – this is why the wording is important though because if you go to 2.24 in your submissions where you've got for example particular 1, how WorkSafe has characterised that in their written submissions is the Buttles should've taken reasonable steps to understand WML's health and safety obligations and their obligations as officers. Is WorkSafe's case that they took no reasonable steps?

A. That's right.

Q. So it's not a situation where we say you don't, you didn't take all reasonable steps or the reasonable steps that you should've taken and here's where you've been deficient, we're saying you took no steps that could be amounted even if we could identify the steps that we can identify can't be described as reasonable ones. And the absence of anything else we say isn't a void, it is evidence that you did nothing?

A. That's right and we stand and fall on that.

Exchanges between the October Ruling and May Ruling

[59] On 8 December 2022, following the October ruling, the applicants' lawyer sent a third letter to WorkSafe's solicitors asking WorkSafe to reconsider whether it could prove their case as was represented to the Judge — that the Buttles "did nothing". WorkSafe's solicitors responded on 1 February 2023. They said that WorkSafe's case was that the Buttles took no reasonable steps, not that they did not take any steps at all. They pointed to Mr Gibson's evidence:

> Mr Gibson's evidence, as summarised above, sets out in a non-exhaustive way, the types of reasonable steps the Buttles were required to take in order to comply with their due diligence obligations. As you noted at the hearing, Mr Gibson does record the Buttles took some steps. However, Mr Gibson's evidence is to the effect that the steps taken by the Buttles were inadequate; that is, they did not amount to reasonable steps, so as to meet their due diligence obligations as officers of WML.

[60] The Buttles say that this letter presented a fundamentally different case to that outlined to the Judge and recorded by him in the October Ruling that WorkSafe's case was that no steps were taken.

[61] On 27 February 2023, the Buttles filed an application for the charges to be amended in accordance with the October Ruling to the allegation that they "did nothing" to achieve the stated matter set out in the charges; or alternatively for WorkSafe to add further particulars "of the reasonably practicable steps the defendants allegedly failed to take". On 10 March 2023 WorkSafe filed a memorandum reflecting what it had advised the Buttles in the 1 February letter.

[62] In a minute dated 14 March 2023, the Judge declined to amend the charges or require the particulars sought.[48] He noted that the parties disagreed as to the nature of WorkSafe's case but that it was not appropriate at that point to relitigate the earlier ruling.[49] The Judge considered that the appropriate remedy was for the Buttles to renew their objection once they saw how WorkSafe presented its case.

[63] On 31 March 2023 the Buttles' lawyers sent a fourth letter to WorkSafe's solicitors. Relying on the evidential difficulties WorkSafe would face in establishing no steps were taken, this letter invited WorkSafe to withdraw the charges.

[64] WorkSafe's solicitors responded on 12 April 2023. They reiterated that while the October Ruling, read literally, was that WorkSafe's case was that the Buttles did nothing at all, "[t]his is not and has never been WorkSafe's case". Rather, WorkSafe's case is that "the steps the Buttles took … were insufficient because they were not reasonable steps towards achieving the outcomes in s 44".

May Ruling

[65] On 16 May 2023 the Buttles filed another application for an order that the charges be dismissed and provided the Court with the communications summarised in the previous section.

[66] The Buttles submitted that the Court would be unable to convict the Buttles on the charging documents based on allegations that they "did nothing". Therefore, there was no case to answer. Contrary to the position taken by the Judge in the October Ruling, WorkSafe's case was now not that the Buttles did nothing, but rather that the

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48 *WorkSafe New Zealand v Buttle* CRI-2020-004-009514, 14 March 2023.
49 At [3].

steps taken were inadequate. The Buttles contended that it would be an abuse of process for WorkSafe to depart from the case as confirmed in the October Ruling. Moreover, no amendment should now be permitted to save the charges by reference to particularisation of reasonable steps that should have been taken.

[67] This application was the subject of the May Ruling. The Judge stated that as regards to the October Ruling, he "only ruled in WorkSafe's favour because [he] understood its case to be that the Buttles did nothing".[50] In all but "one respect", he would have found an abuse of process on the application before him. That is because if WorkSafe now wished to argue that the Buttles took some steps but failed to take others, it needed to particularise those others.

[68] The "one respect" related to the allegation in particular (c) of the charging sheet that the Buttles failed to take reasonable steps to ensure appropriate resources were available to minimise risks to health and safety.[51] The Judge considered that the summary of facts "fully informs the Buttles of everything they need to know" about that allegation. The relevant passage of the summary of facts states:

> [3.11] … Despite WML making approximately $1 million in profit each year, this money was not reinvested … into obtaining expert advice on how WML could ensure that guided tours of Whakaari were conducted safely.

I note that this is the extract that the Buttles had referred to in their October 2021 letter I referred to at [43] above.

[69] While the Judge acknowledged that WorkSafe attempting to rely on the summary of facts to supplement a defective charging document could amount to an abuse of process, he considered it did not here. As the summary of facts was made available to the Buttles at the same time as the charging documents, there was no prejudice, and it did not affect the public interest in the integrity of the justice system to such an extent as to outweigh the public interest in trying the allegations.[52]

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50 May Ruling, above n 2, at [9].
51 At [12].
52 At [13].

[70] The Judge acknowledged the Buttles' submission that even restricting the charge to this limited extent caused prejudice to their right to a fair trial. He noted that since October 2022 the Buttles had relied on WorkSafe's case being that they took no steps at all and they had prepared a defence on that basis (including the s 147 application). The Judge then stated that despite this, "prudence would also demand that they would have been preparing for the possibility of trial at the same time".[53] Additionally, the Judge noted that WML faced the "same allegation" and would have been preparing to meet this allegation. The Buttles therefore could also meet this allegation.[54]

[71] The outcome was that the Judge limited the charges to particular (c) that the Buttles failed to obtain expert evidence on how WML could ensure that tours of Whakaari were conducted safely.[55]

[72] He went on to hold that there was a case to answer on this charge on the basis that the Buttles accept that WorkSafe has evidence that:

> (a) Andrew Buttle was actively involved in managing the operation of WML during the period;
>
> (b) all three were directors of WML and, therefore, should have been aware of WML's activity;
>
> (c) prior to the charge period, WML had been put on notice by GNS that it should at least consider getting expert evidence, and
>
> (d) WML did not get expert advice.

[73] Whether some of the concessions as set out above were made or are correct is a matter raised in the substantive judicial review. So is the Judge's characterisation of WML "facing the same allegation" as the Buttles and the extent to which the Buttles could benefit from WML's trial preparation (when the latter had chosen to advance a limited legal defence).[56]

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53 At [15(a)].
54 At [15(b)].
55 At [19].
56 Refer [77] below.

Amendment of charges

[74] By a minute dated 15 June 2023, on application by WorkSafe, the Judge amended the charges such that the remaining wording reads:[57]

> (a) [the defendant] failed to take the following reasonable step:
>
> (i) To ensure that WML had available for use and used appropriate resources to eliminate or minimise risks to health and safety from WML permitting access to Whakaari, by failing to obtain expert advice on how WML could ensure that guided tours of Whakaari were conducted safely.

[75] This reflected the May Ruling. It is this charge that each of Buttles is facing in the trial that is underway.

Prejudice – Expert evidence

[76] The Buttles' application was supported by affidavits of Lisa Walsh sworn 21 June 2023 and Philippa Couldwell affirmed 21 July 2023.[58] These affidavits are directed at showing prejudice to the Buttles from the Rulings.

[77] Ms Walsh's affidavit recorded that neither the Buttles nor WML had engaged an expert as at the date of her affidavit. She said that WML's strategy has been to defend the charges against it on legal grounds that do not require a health and safety expert. She stated that the Buttles had tried but failed to engage an expert on the remaining charge alleged against them following the May Ruling but before then they (reasonably) did not apprehend an expert was necessary. She referred to relatively lengthy timeframes in which other experts involved for other parties had produced their reports.

[78] Ms Couldwell's affidavit detailed the unsuccessful steps taken by the Buttles after May 2023 to try to obtain an expert including those steps taken after the date of Ms Walsh's affidavit.

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57 *WorkSafe v Buttle* [2023] NZDC 12076 at [3].

58 Ms Walsh is a Legal Executive at the Buttles' instructing solicitors' firm. Ms Couldwell is a Special Counsel there.

Is the threshold test met?

[79] The Buttles' position is that the prosecution process, which is intended to provide the defendants with an opportunity to prepare properly for trial, has seriously derailed in this case to their prejudice. They say this can only be addressed justly through the present application, which concerns a narrow issue, and it is not sufficient or appropriate to say that the matter can be dealt with on appeal following the completion of the trial.

A narrow issue?

[80] In *New Zealand Defence Force v District Court of New Zealand* the relevant pre-trial issue was dealt with by review.[59] That case involved a very narrow legal question which would dispose of the prosecution as to whether the Chief of the Defence Force validly exercised a power to make a declaration under a specific provision. The parties agreed that the Court determine the issue on review, so no issue of threshold was engaged.

[81] The Buttles contend that the key issues advanced in the judicial review arising out of the Rulings[60] as to the necessary particularisation of charges under s 44 is also a narrow one that can and should not await ultimate appeal.

[82] I do not view the judicial review sought here as involving a confined legal issue on which I am equipped to deliver a knock-out blow after a half day hearing. The matters before me involve the interaction of two judicial rulings and raise an important question of law of precedential significance on the necessary particularisation of charges under s 44 as compared with s 36. I do not consider the issue is as straightforward as Mr Foote suggested given the different wording of the sections and the interaction of the specific factual context/the Rulings.

[83] I would also need to consider whether the charges were saved by the May Ruling or otherwise. That involves considering whether the reference in the summary

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59 *New Zealand Defence Force v District Court of New Zealand* [2022] NZHC 3559, [2023] 2 NZLR 512.

60 Under grounds of errors of law.

of facts to funds not being "reinvested … into obtaining expert advice on how WML could ensure that guided tours of Whakaari were conducted safely" provided sufficient detail so that even if the charge was defective it was not a nullity. There is a legal question as to whether, if so, the amendment from the summary of facts was available following *Talley's* case. There is also the question whether the amendment caused a miscarriage of justice or not, being the test for whether amendment is permissible to cure a defect. There are also a range of other issues raised in the review such as whether concessions were made and some factual issues.

[84] As Mr Foote acknowledged, the High Court cannot dismiss the charges under s 147. I am being asked to stay charges now in circumstances where the District Court is not only seized of the matter but is part way through the trial. No case was cited to me where a stay was granted in those circumstances. The alternate substantive relief sought is that having identified errors on review, I remit the matter back to the District Court. I consider that seems the more likely outcome of a judicial review given the complex situation. However, I accept WorkSafe's submission that quite what would be remitted and what would then occur is far from clear in the context of the two interconnected rulings, the June 2023 amendment of the charges by the Judge following the May Ruling, and when the trial is now in process.

[85] Standing back, these factors demonstrate why the legal issues raised by the Buttles need to await an appeal, should they be convicted, rather than being addressed now.

Irremediable prejudice?

[86] In any case where judicial review is sought of a decision not to dismiss or stay charges under s 147, by deciding the matter should await appeal (as is contemplated by the CPA) the consequence will always be that the trial proceeds.

[87] Under the CPA, the Buttles have full rights of appeal in the event they are found guilty at trial. All arguments advanced before me now can be advanced then. A range of effective remedies are available at that point including quashing any conviction, a stay, or a retrial. Mr Foote did not submit to the contrary. His argument centred more on the asserted unfairness of the current trial and the consequences on the Buttles of

that process and a potential conviction in terms of media attention, stress and cost. Here the Buttles raise the high-profile nature of the hearing, given the tragic events at Whakaari, and therefore the significant public scrutiny they are facing which will be exacerbated by a conviction, if that occurs.

[88] The trial against the Buttles is already well advanced. The reality is that they have already been subject to substantial negative media attention. Accordingly, the negative consequences relied on have largely already occurred. Therefore, the issue is with publicity for the remainder of the trial and the consequences if there is a conviction, and the reputational damage even if ultimately that was overturned on appeal. In any event, I do not accept that the media attention due to the high profile of the matter represents "truly exceptional circumstances".[61] The high profile of the matter is a function of the considerable degree of legitimate public interest in the tragic events at Whakaari. This tends to reinforce that a very high threshold would be required before I acceded to staying the charges when the matters raised can be pursued on appeal.

[89] While cost is raised as an issue, that can be addressed by appropriate costs orders. On the cost aspects it has some relevance that WML and the Buttles have been jointly represented hence it is only the incremental cost of the Buttles' representation that is in issue. I acknowledge the Buttles' advice that WML's strategy has been a limited legal defence, although I understand it has lawyer/s present throughout.

[90] On the issue of prejudice, I accept the Buttles' position that they did not consider an expert was necessary. From the May Ruling it is evident that the Judge formed the view that whatever their subjective views, it would have been prudent for the Buttles to have engaged with an expert earlier. For the present context, this is relevant to whether the prejudice complained of really flows from the Rulings. I discuss the objective position below, as it also engages with the conduct of WorkSafe.

[91] However, for present purposes, in my view even if correct that there is prejudice of this character, in all the circumstances it is not appropriate that any

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61 Compare *Banks v District Court at Auckland* [2013] NZHC 3221 at [25]–[27].

impacts of the Rulings (assuming a basis for review) be dealt with now by judicial review.

Stay on the basis of the public interest in the integrity of the justice system

[92] As an alternative basis for satisfying the threshold for judicial review, the Buttles submit that WorkSafe's conduct is such that to permit the charges to proceed in the circumstances affects the integrity of the justice system to such an extent that it outweighs the public interest in trying the charges.

[93] WorkSafe pointed to the extreme facts in *Wilson v R* as illustrative of the high threshold involved in meeting this test.[62] In that case the police had engaged in extraordinary subterfuge including manufacturing an illusory search warrant and having an undercover officer face false charges in the District Court. The Supreme Court majority did not consider the case justified a stay. Cases in this area turn on all the circumstances, but I agree that the character of the conduct in *Wilson* is of a different order altogether from the conduct the Buttles point to as justifying a stay of proceeding in judicial review.[63]

[94] The Court of Appeal in *Talley's* case recorded that: the "sanction of a stay is primarily aimed at prospective correction in the case of systemic misconduct" and noted that must particularly be the case where the impugned conduct was in good faith.[64]

[95] While "misconduct" justifying a stay of proceedings does not necessarily require this, the Buttles do not allege bad faith or deliberate misconduct by WorkSafe. The Buttles submit that a situation of misconduct emerges from the fact that:

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62 *Wilson v R*, above n 34, did not involve the threshold test for judicial review of a lower court decision in a pre-trial context but rather whether charges should be stayed for prosecutorial misconduct.

63 I was also referred to *Bennett v District Court* [2020] NZHC 1730. There, the threshold test was met and charges were stayed on the basis of established case law that a "disguised extradition" is such a fundamental breach of freedoms and rights as to be a serious abuse of process by the executive justifying a stay. I agree with WorkSafe that those circumstances are not comparable to the present.

64 At [85] set out at [29] above.

(a) The charges were not properly particularised from the outset and no application was made to amend the charges despite the Buttles' request to do so in October 2021.

(b) It was, or ought to have been, plain to WorkSafe that the Judge and the Buttles had misunderstood the nature of its case in the October Ruling as one where no steps or no reasonable steps were taken. It is only on this basis that the Judge had been prepared to "save" the charges. The way WorkSafe subsequently characterised its case fundamentally changed in its February 2023 correspondence. WorkSafe in effect, misled the Court albeit by innocent misapprehension, and should have taken steps to clarify the position.

(c) When the Judge was advised that the scope of WorkSafe's case was other than what he had understood in his October Ruling, the Judge indulged WorkSafe by saving one of the charges through reference to the summary of facts of the Court's own motion. The Judge ought not to have used the summary of facts to remedy a defect in the charges, and WorkSafe ought to have refused to go along with this, given the assurance given to the Court of Appeal in *Talley's* case.

[96] The Buttles' written submissions also pointed to the charges being "holding charges" in the sense of charges being laid without sufficient evidence within the charging period with the hope of buttressing them afterwards. This was relied upon as demonstrating that WorkSafe has continued to engage in a charging practice of the nature criticised in *Talley's* case. In response, WorkSafe maintained that it had sufficient evidential basis to charge the Buttles as at 30 November 2020. The Buttles expressly do not concede this is correct. However, in oral argument, Mr Foote acknowledged that an enquiry into whether WorkSafe had sufficient information to charge is not maintained as a matter I can address in this application. That was a sensible position to take. However, the consequence is that the allegation that these were "holding charges" of the kind criticised in *Talley's* case falls away for present purposes.

The position before the October Ruling

[97] The Buttles emphasise that WorkSafe's letter in November 2021 advised them that the case was that "they failed to take any reasonable due diligence steps"[65] as opposed to the contention that "some reasonable steps were taken but they were not sufficient" or that "some reasonable steps were taken but others were not".

[98] WorkSafe says its case has always been that the Buttles "failed to take any reasonable steps"/"took no reasonable steps". Mr Hodge contended that from the outset the parties have been talking past each other on the scope of the case, because of their different perspectives on this question. WorkSafe says that to assess whether even any one step is reasonable or not requires context. Mr Hodge also emphasised that what is reasonable is an issue for trial.

[99] I accept that WorkSafe's position has always been that none of the steps taken were reasonable and that assessing whether due diligence has been exercised under s 44 is an evaluative judgment that differs from the primary duty considered in *Talley's case* to take "all reasonably practicable steps." I agree that is potentially an approach open in the context of s 44. By the Gibson statement in March 2022, WorkSafe had pointed to the steps that were taken (none of which WorkSafe considered to be reasonable). In the material provided to me I do not see any suggestion that WorkSafe was other than genuine in its view that its original charges were sufficiently particularised. WorkSafe advised that it does not accept the Judge's view in the May Ruling that they were not.

[100] As well, the communications exchanged between the parties in October and November 2021 had considerable focus on the summary of facts. For its part the Buttles contended the summary of facts would not save the charges in their original form because insufficient further detail was contained in them. WorkSafe responded that both the charges and the summary of facts were sufficiently particular and that any defect in the former could be cured by the later, in accordance with *Talley's* case, if it was wrong in the primary view that the charges were already appropriate.

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65 The full paragraph is set out at [47] above.

[101] Accordingly, it is fair to say the Buttles were firmly on notice of the potential significance of the summary of facts as supplementing the charges as filed but held a different view on whether that would save them in any event. WorkSafe proceeded on what it understood to be the law, in a manner that was not, and was not intended to be, misleading to the Buttles. WorkSafe has also always made clear it considered it could rely on the summary of facts in submissions to the District Court.

[102] As I have said, in this application it is not contended that there has been systemic misconduct by filing of "holding charges" without sufficient evidence. Here the summary of facts was provided at the outset and within the charging period. In those circumstances reliance on the summary of facts to save a defective charge where there is no miscarriage of justice does not have the same offensive character as the practice criticised in *Talley's* case. On that assumption, it cannot be said WorkSafe adopted the "flawed charging practice" criticised in *Talley's* case.

The position after the October Ruling

[103] There is a question whether the position changed after the October Ruling. In the October Ruling the Judge characterised WorkSafe's case as being that the Buttles took "no steps" at all (that is, a "do nothing" case). Mr Foote advised me in argument that he was content to proceed on the basis that it is implicit in the October Ruling that the word "reasonable" could be read into both the Ruling and the subsequent communications. This jars somewhat with the tenor of the Buttles' correspondence and some comments of the Judge in the May Ruling. However, it is an appropriate position to take. Taken literally, as Mr Foote acknowledged, a "do nothing" case is illogical and could be met, for example, simply by chat among the Buttles about the topic of risk at Whakaari. WorkSafe did not convey to the Court or the Buttles that this was a "do nothing" case in that sense. The Gibson statement and evidential summary filed by WorkSafe for the October hearing showed that the Buttles took some steps, but that on WorkSafe's case, none of them were reasonable. There is also the transcript exchanges between the Judge and Ms McDonald[66] where counsel emphasised that WorkSafe's case was that the Buttles took "no reasonable steps". I approach the matter on this basis. That being the case, WorkSafe cannot be unduly criticised for failing to

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66 See [58] above.

raise with the Judge after the October Ruling that the word "reasonable" needed to be read in.

[104] The Buttles maintain that they then proceeded on the basis that they need only show they took "one reasonable step" to defeat the charges and at the least this is what the Judge also considered. They say that even had the Buttles had an expert to that point (which they did not), the October Ruling and WorkSafe's concession in it meant that they could proceed without an expert. They say that given their reliance on this, WorkSafe's failure to correct the misunderstanding is misconduct of a nature that meets the threshold test.

[105] I do not agree. WorkSafe says its position remains even now that the Buttles took "no reasonable steps" for the reasons I discuss above. It is this case that WorkSafe endeavoured to explain in its letter in February 2023 following the October Ruling. I see merit in Mr Hodge's point that whether there has been even one reasonable step requires a degree of context.

[106] The reasonableness of even one of the steps taken by the Buttles was a matter that would justify the early engagement of an expert in the event that the charges were not struck out. It seems to me that the Judge was likely right that engaging an expert would have been a prudent step by the Buttles on a "no reasonable steps" case. As I said earlier, this undermines the case for prejudice arising from the Rulings. The Buttles say that the summary of facts did not state what kind of expert was required. Given the context, it seems implicit that this involves health and safety risk management relevant to the PCBU. The affidavit of Ms Couldwell indicates that this is the character of expert that the Buttles have been endeavouring to obtain since the May Ruling. Of course, from March 2022 the Buttles had Mr Gibson's statement which provided more detail to the allegation.

[107] I agree with Mr Hodge's submission that WorkSafe's conduct falls short of justifying intervention by way of judicial review. It does not create an affront to the interests of justice when balanced against the public interest in trying these charges or WorkSafe's conduct.

WorkSafe's "assurance" in Talley's case

[108] The other misconduct the Buttles rely upon is WorkSafe being prepared to rely on the Judge "saving" one charge by reference to the summary of facts when WorkSafe had given an "assurance" that it would not do so in the *Talley's* case.

[109] I do not consider that this is an available complaint on the facts. On the assumption that WorkSafe had sufficient information to charge, it filed charges believing them to be sufficiently particularised and not with a view to shoring up the charges later. Moreover, in *Talley's* case the Court held that as a matter of law a defective charge can be saved by the summary of facts where there is no miscarriage of justice in doing so.[67] WorkSafe provided the summary of facts before the end of the charging period so referring to it cannot be viewed as wrongly subverting the time bar. WorkSafe referred to the prospect that any defect in the charges could be saved by the summary of facts if necessary in its earliest relevant communications in November 2021 and this was also advanced in submissions to the Judge for both the May and October hearings. Accordingly, while the course the Judge took in May was of his own motion, it reflected WorkSafe's position from the outset.

[110] In those circumstances, I do not see this as a case where the Buttles can fairly be regarded as having been taken by surprise by what the Judge did or that WorkSafe can be said to have acted in such a manner as to be affront to the interests of justice.

Conclusion

[111] I dismiss the application for judicial review. The threshold for judicial review for a pre-trial criminal ruling is not met. This is not a truly exceptional case justifying intervention. In accordance with the parties' preference, I do not say anything further about the judicial review points.

[112] WorkSafe has been successful and is entitled to costs. I ask that WorkSafe files any memorandum as to costs within 14 days of the date of this judgment with the

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[67] *Talley's Group Ltd v WorkSafe New Zealand*, above n 16, at [36].

Buttles 14 days after that. Alternatively, if costs can be agreed, the parties should file a joint memorandum to that effect within 14 days.

Anderson J