EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT ASHBURTON

CRI-2015-003-000522
[2016] NZDC 23299

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

TALLEY'S GROUP LIMITED
Defendant

Hearing: 15 November 2016

Appearances: Mr L A Hood and Ms Jeffs for the Informant
Mr Eaton QC and Mr Dawson for the Defendant

Judgment: 6 December 2016

RESERVED JUDGMENT OF JUDGE J E MAZE
ON INTERLOCUTORY APPLICATION

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[1] The defendant asks me to declare the charging document a nullity, or to stay it because of the prosecution's abuse of process, or to limit the scope of the prosecution to that originally charged and disclosed. All three applications are opposed.

The charge

[2] Talley's Group Limited is charged under ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 (HSEA), with failing as an employer to take all practicable steps to ensure the safety of its employee, Te Atutu Hemi, while she was at work, by failing to take all practicable steps to ensure she was not exposed to hazards arising from the operation of a forklift. The charge was not representative. Worksafe has acknowledged (by the date range in the charging document and in

submissions paragraph [26]) that the charge is not confined to the actual accident, but alleges systems failings. It is a category one (fine only) offence. The defendant company is of course innocent unless and until proven guilty.

[3] The alleged offence date was 'on or before 22 May 2015', the charging document was filed 20 November 2015 and the first appearance was 14 December 2015.

[4] The limitation period applicable at the time under HSEA was 6 months. If the date of the alleged offence was 22 May 2015, the charging document was time barred from midnight 21 November 2015, one clear day after the charge was filed. Worksafe could have sought an extension of time under s 54B HSEA but elected not to do so.

Case Management

[5] The defendant company pleaded not guilty on the second appearance on 11 January 2016.

[6] The case review date was 25 February, adjourned to 24 March by consent.

[7] On 30 March the Registrar directed a case review hearing before a Judge on 2 May 2016, as the case was even then said to require five days of hearing time.

[8] The case review hearing took place on 21 June 2016, when Mr Eaton sought an adjournment as the prosecution had disclosed on 16 June the "first part" of an expert's report of considerable length. I recorded the reason for adjournment, noting also that the prosecution had not yet disclosed the list of intended witnesses.

[9] The June case review hearing was again adjourned to 29 August, and then to 26 September, before which date the defence had filed the present applications. No substantive hearing date has yet been allocated.

[10] Other Relevant Dates

(a) 22 May 2015 was the date of an accident involving Ms Hemi ;

(b) 20 November 2015 charging document was filed;

(c) 1 December 2015 charging document was served;

(d) 11 January 2016 Talley's pleaded not guilty;

(e) 9 February 2016 Worksafe provided what it called 'full disclosure';

(f) 17 March 2016 Worksafe engaged Luke Cunningham Clere (LCC);

(g) 22 March 2016 LCC advised defence they would be taking expert advice; this was ten months after the limitation period had started to run, and four months after it had expired;

(h) 2 May 2016 LCC advised the name of the intended expert (the first part of the report was disclosed 16 June);

(i) 26 August a second summary of facts was served, with notification that nine prosecution witnesses would be called. However a summary of the intended evidence of just seven of those nine was provided.

The practicable steps which it is alleged Talley's failed to take

[11] The first summary of facts disclosed to the defendant in February 2016 alleged :

> [34] The following practicable steps were available to the defendant and should have been taken:
>
> (a) to have carried out a detailed and effective hazard assessment for the work being carried out in the 'paddle track area' of Coolstore One.

(b) to have implemented detailed and effective procedures to separate forklifts and pedestrians /other workers.

(c) to have ensured that the forklifts provided for employees to use could safely stack bulk bins five high.

(d) to have ensured that the bulk bins being lifted by forklifts were always supported by the backrest or the forklift mast. This could have been achieved by creating a Standard Operating Procedure that specified how bulk bins were to be stacked, training the employees in this methodology, and auditing employee behaviour to ensure compliance.

The choice of punctuation and wording for the paragraph above does not specify that the allegations are alternatives, a matter of some practical importance to the defendant. Therefore I assume them to be multiple allegations of separate failures.

[12] The second summary of facts (August) alleged :

[34] The following practicable steps were available to the defendant and should have been taken:

(a) to have carried out a detailed and effective audit and risk management process in respect of the 'paddle track area' of Coolstore One. This would have included identifying the potential for bins to fall from forklifts, bins stacked in storage rows to be knocked and fall during forklift movements, and for bins stored in storage rows to collapse and fall.

(b) to have implemented detailed and effective procedures to separate forklifts and pedestrians/other workers, including but not limited to:

(i) delineating all areas where forklifts were operating and classifying these areas as an exclusion zone for all pedestrians;

(ii) creating a physical barrier to prevent interactions between moving forklifts and pedestrians:

(iii) ensuring forklift movement was stopped before pedestrians entered the exclusion zone;

(iv) having a maximum of one forklift and its driver in the paddle track area of Coolstore One at a time;

(v) prohibiting pedestrians from standing adjacent to forklifts whilst they were stacking bins;

(vi) limiting the height to which empty bins can be stacked to 2 high in areas where pedestrians can be standing adjacent, such as the paddle track area

(vii) limiting the height to which full bins can be stacked to 4 high in areas where pedestrians can be standing adjacent such as in storage aisle BO1 in Coolstore 1.

(c) to have implemented a larger pedestrian exclusion zone through procedural controls in areas where 2 bins are being carried at a time, due to the significantly increased potential for the upper unsupported bin to fall. Procedural controls include but are not limited to:

(i) the pedestrian exclusion zone should have been at least 5 metres in general movement areas.

(ii) the pedestrian exclusion zone should have been at least 8 metres whilst forklifts are stacking bins up to 5 high in cool room storage areas.

(d) to have implemented a physical barrier to prevent bins from falling from adjacent stockpiles and to prevent interactions between pedestrians in the paddle track area with moving forklifts stacking full bins. Alternatively but with lesser effectiveness, to have implemented a pedestrian exclusion area at least equal to the height of stacked full bins in the stockpile metres.

(e) to have delineated the zone on the ground surface in the paddle track area where the limitation to operating only one forklift and its driver at a time applies.

(f) to have ensured that the forklifts provided for employees to use could safely stack bulk bins five high.

(g) to have ensured that the bulk bins being lifted by forklifts were always supported by the backrest or the forklift mast. This could have been achieved by:

(i) requiring that bulk bins were stacked one at a time; and

(ii) creating a Standard Operating Procedure that specified how bulk bins were to be stacked, training the employees in this methodology, and auditing employee behaviour to ensure compliance.

[13] Mr La Hood submits the second version of paragraph [34] is merely an enlargement or explanation of the first. Mr Eaton submits it represents a change from four alleged failures to 15 such, and represents a vastly different and substantially increased series of allegations. Yet again as the paragraph does not

claim these to be alternative factual assertions of offending, they must be seen as fifteen separate alleged failures within the one charge.

[14] I can accept paragraphs (a) to (d) in the first summary of facts are repeated and enlarged in paragraphs (a), (b), (f) and (g) in the second summary of facts. The use of the term 'includes but is not limited to…' is singularly unfortunate as it introduces an element of uncertainty as to the precise allegations the defendant faces within a criminal prosecution. The purpose of disclosure is to put the defendant on notice of the allegation it faces and may respond to. It is relevant not only to defended cases. In sentencing, the number and extent of failings is relevant to banding and fixing the starting point. Every defendant must be told at an early stage what is alleged, so as to have fair and reasonable opportunity to prepare a defence.

[15] For the purposes of this application, enlarging those four alleged failures from the first summary of facts to eleven specified failures, must be seen as a very significant change in the scope of the allegations.

[16] Paragraphs (c), (d) and (e) are four entirely new alleged failures, and any of the now fifteen allegations of failures can have occurred on either 22 or 21 May 2015 (see [20] below).

[17] Therefore Mr Eaton must be correct in saying that a charge which amounted initially to an accusation that Talley's had failed in four respects to take all practicable steps to ensure safety, has become at the very least a charge alleging fifteen separate specific failures. I accept that on any objective assessment that is a very real and significant change in the charge faced by the defendant.

The questions for this Court

[18] The questions are:

(a) Is this charge a nullity? If it is not a nullity, does the charge contain faults requiring consideration of s 379 CPA?

(b) Has abuse of process occurred, and if so should the charge be stayed?

(c) If the charge is valid and is not stayed, should Worksafe now be obliged to prosecute on the basis of the first summary of facts, and only on those four original alleged failures?

Nullity

[19] There are here three problems with the charging document as laid, and they relate to the dates of the allegations, the requirements of s 17(1) and the requirements of s 17(4) CPA.

[20] The charging document here alleges a single (non-representative) offence of failing to take all practicable steps to avoid hazards for an employee operating a forklift 'on or before 22 May 2015'. The time limit for bringing a prosecution under the Act was 6 months. The six month limit begins at the first minute of the next day after the event giving rise to the right to lay the information, and ends at midnight on the last day constituting six calendar months later (*MAF v Whiting* 25/3/93 HC Auckland, AP11/93). The charging document was filed 20 November 2015, and therefore any allegation of offending, before midnight ending 20 May, was already time barred. As with the term 'including but not limited to…' in the summaries of facts, the imprecision is unfortunate. It is difficult to see any bona fide reason for Worksafe to introduce either uncertainty into a criminal prosecution. The words 'on or before' will therefore require amendment to specify both dates which remain available, or those two dates as alternatives, or to reduce the allegation to one of those two dates. That will necessitate consideration of s 379 (*H v Police* (1994) 11 CRNZ 632). Such amendment would be necessary to enable the defendant to identify and respond to what is alleged in a charge alleging multiple systems based failures, not confined to the accident on 22 May 2015.

[21] Mr Eaton submits the charging document as laid fails to meet the obligations of s17 Criminal Procedure Act (CPA) and is a nullity.

[22] Section 17 CPA provides :

> (1) A charge must relate to a single offence.
>
> (2) A charge that is worded in the alternative must be identified as such.
>
> (3) A representative charge must be identified as such.
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> (4) 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.
>
> (5) Without limiting subsection (4), the particulars provided under that subsection must include—
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> (a) a reference to a provision of an enactment creating the offence that it is alleged that the defendant has committed; and
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> (b) if the charge is a representative charge, the information specified in subsection (6).
>
> (6) The information referred to in subsection (5)(b) is as follows:
>
> (a) particulars of the offences of which the charge is representative, including, without limitation, when values, amounts, or quantities are relevant, particulars of the minimum values, amounts, or quantities that the prosecution must establish in order for the charge to be proved; and
>
> (b) the dates on or between which the offending is alleged to have occurred.
>
> (7) Subsection (1) is subject to sections 19 and 20.

[23] Section 18 CPA permits a Court to order the prosecutor to provide further particulars of any document, person, thing or other matter relevant to setting out the charge if that is *necessary for a fair trial.* Section 19 permits laying alternative charges within the one document if the statute creating the offence permits alternative allegations. Section 20 (1) CPA permits a prosecutor to bring a representative charge if multiple offences of the same type are alleged, they are alleged to have been committed in similar circumstances over a period of time, and the nature and circumstances are such that the complainant cannot reasonably be expected to particularise dates or other details. Alternatively under s20(2), such a charge can be brought where multiple offences of the same type are alleged, they are alleged to have been committed in similar circumstances such that the defendant is

likely to enter the same plea to all if charged separately, and it would be unduly difficult to manage the charges laid separately. Section 379 CPA is a saving provision.

[24] A charging document which fails to allege an offence at law, or fails to accuse a legal person will be a nullity. It is void ab initio. It therefore cannot be saved under s 379, nor can it be amended (*Muirson v Collector of Customs* [1982] 2 NZLR 506). It is plain CRN 15003500056 alleges a legal entity (Talley's Group Limited) committed an offence created in law. Therefore this charging document is not a nullity.

[25] I now consider the requirements of s 17(1) CPA. I accept Mr Eaton's argument that this is a charge where the law is broken in effect by each and every separate failure to take a practicable step. A failure to take a specific practicable step will therefore constitute an element of the offence, and each failure necessarily constitutes a separate offence at law. However, unless the charging document is representative, it can allege one offence only, and must therefore allege a single failure.

[26] I refer to *New Zealand v Department of Corrections* [2016] NZDC 18502. Her Honour Chief Judge Doogue found at [37]:

> The definition of practicable steps requires the prosecution to identify both the type of actions or inactions that it alleges the employer must take steps to prevent and the type of harm that could result if those actions or inactions are not prevented. Even in view of systemic failure, the prosecution will need at least to prove the type of conduct it alleges the employer was obliged to take steps to prevent.

That paragraph supports the view that each failure is an element of an offence, and is to be proven beyond reasonable doubt.

[27] In short then, as the charging document here is not representative, it must allege a single offence (s 17(1)), when in fact it contains allegations of fifteen offences (both because the summary of facts asserts so, and that is what counsel for Worksafe has presented in this argument). It presents an allegation of multiple offending in a form which the law prohibits, and it requires amendment if

amendment is possible under s 379 (either by amending to 'representative charge" or by permitting Worksafe to choose and particularise a single allegation to pursue).

[28] I turn now to consider the minimum requirements of the charging document and s 17(4) CPA. The charging document must contain sufficient particulars to fully and fairly inform the defendant of the substance of the offence it is alleged to have committed. Logically this obligation arises as soon as the charging document is laid. They are contemporaneous obligations upon a prosecutor. Mr La Hood says he has already provided sufficient particulars in the charging document, and if that were not enough, in the summary of facts, but if that were also not enough, the charge can be amended (I will come to s 379 and amendment shortly).

[29] Mr La Hood submits he has already provided in the charging document sufficient particulars to fully and fairly inform the defendant (a date, a place and detail that the charge relates to an employee using a forklift in the course of employment), and nothing more is required at law. Mr Eaton submits that any defendant served with this charging document would immediately ask "what did I fail to do to ensure safety that I could practicably have done when the forklift was used on or before 22 May 2015?" Mr Eaton submits that the minimum particulars to fully and fairly inform the defendant in the context of a wide duty to ensure safety must include the particular failures upon which the prosecution relies.

[30] The cases establish that the degree of particularity required will vary with the nature of the charge. The prosecutor must reveal the essence of the charge, although it is not necessary to reveal the details relied upon to meet the charge. In some cases a few particulars only are required, while in more complex cases there must be greater detail (*Police v Wyatt* [1966] NZLR 1118; *R v Terry* CA 460/03, 6 April 2004). Although those cases relate to s.17 Summary Proceedings Act 1957 and not s 17 CPA, they remain good law as there is little difference between the two provisions. I accept also that under s 24 New Zealand Bill of Rights Act 1990, a defendant has the right to be informed promptly and in detail of the nature and cause of a charge.

[31] I am satisfied for simple practical reasons particulars of the alleged failures are required to be specified in the words of the charge laid under ss 6 and 50(1)(a) HSEA. They reflect an element of the offence to be proven beyond reasonable doubt. I accept Mr Eaton's 'obvious question' from any defendant served with a charging document like the one here is inevitable; that alone should inform Worksafe as to the minimum wording. Furthermore such particulars are essential to avoid possible special pleas, now or in the future. Without them, the defendant is not fully informed of what it is accused of.

[32] In Australian law it is clearly established that the statement alleging the offence must particularise the act or omission constituting the breach of the law. It is relevant to the defence available under the applicable legislation, and it is recognised that:

> The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he…is charged, but also of the particular act, matter or thing alleged as the foundation of the charge. (*Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1).

The court in Kirk concluded that without such particularisation the Court would in effect be conducting an administrative commission of enquiry, rather than undertaking a judicial function

[33] Worksafe submits *Worksafe v Waimea Sawmillers* [2015] NZDC 21082 is authority for the proposition that specification of the failings is not required. Her Honour Judge B Morris recorded that the charge could have been better worded but it gave adequate notice to the defendant of the allegations before the Court. The background to the issue is reflected in paragraph [41]. No authorities are cited by Her Honour for reaching that conclusion, but it plainly involved considering during the hearing whether particulars were required to enable the defendant to respond to the charge as laid. No mention is made of s 379, and the complaint about specificity seems to have been raised and resolved on a purely pragmatic basis, with no specific reference to the legal process under CPA. The defence sought to confine the hearing to the circumstances surrounding an accident, which the Judge rejected, finding the law did not require a causative link to be proven between a failure and an accident. The case proceeded on three alternative allegations of failures, without the need to

link any to the accident. The balance of the judgment relates to interpretation of the HSEA and regulations, and findings of fact. The requirements of s 17(4) and s 17(1) CPA were not argued on appeal. Therefore the case is not authority for the proposition that Worksafe does not have to particularise the failures relied on for the charge; in practical terms that case was seen as already and always alleging three factual alternatives.

[34] I accept a charge of failing to take all practicable steps can only comply with s 17(4) CPA if it asserts the failure (or if representative, the multiple failures) relied upon. Such an omission however does not render the charging document a nullity, as it can potentially be saved by s 379.

[35] In summary then:

- Despite the clear wording of s 17(1) CPA Worksafe has elected to file a non - representative charging document alleging fifteen separate offences on either of two possible dates. That amounts to laying at least fifteen charges in one and clearly breaches s 17(1). The available remedies necessarily involve using s 379 either to permit Worksafe to select one offence and proceed with it, or to seek to amend the charge to a representative charge.

- Under s 17(4), the charge must specify particulars of each failure relied upon by Worksafe, because each alleged failure is a separate offence, and the defendant must be told what is the essence of the offence alleged. Had Worksafe provided the particulars, it would immediately have seen the duplicitous nature of the charging document, at a time when it could still have been corrected within the limitation period. The vague wording here disguises the faults.

[36] Worksafe submits that in the event the wording of the charge is found to be lacking, the summary of facts remedies the problem, but if all else fails, the charge can be amended under s 379. Mr Eaton disputes both propositions.

Can Worksafe's failures to comply with s 17 CPA be remedied?

Summaries of Facts

[37] Worksafe has referred me to cases in which Courts have referred to different ways of putting the defence on notice of the prosecution case, other than by ordering further particulars.

[38] In *S v Police* [2013] NZHC 2846 it was argued on appeal that where there had been charges alleging assault with identical wording a miscarriage of justice had occurred. Her Honour Katz J said:

> On their face the informations therefore appear to be duplicitous. Viewed in isolation they do not include sufficient information to adequately inform Ms S of the charges she was facing…..the informations did not contain sufficient particulars in terms of s 17 of the Act to fairly inform Ms S of the substance of the various offences with which she was charged.

The case was determined under Summary Proceedings Act 1957. Referring to *Price v Police* (HC Wellington CRI-2010-485-104, 8 December 2010), Her Honour noted that the saving provision s 204 applied unless there had been a miscarriage of justice. She found no miscarriage of justice had occurred because the defence had not challenged the charges at any earlier stage, in practical terms the particulars were set out in the summary of facts, and there had been no challenge to adequacy of the particulars at trial or before. Her Honour concluded that on the facts of that case the defendant was on adequate notice of the case she was required to meet. *S v Police* is not authority for the proposition that supplying a summary of facts with the charge is sufficient to adequately define the substance of the offence. On appeal the High Court had merely concluded that s 204 'saved' the inadequately framed charges because on the facts there was no miscarriage of justice.

[39] Worksafe referred me to *R v Graham, Reeves, Jeffries and Bryant* (CRI 2010-085-2538, 8 July 2011, paras [126] to [129]). That case is also not authority for the proposition that a summary of facts has legal status as particulars per se. Those paragraphs show that counsel reached agreement to treat certain paragraphs of the summary as the further particulars which had been sought, and they did not seek a formal order. His Honour Justice Dobson noted that meant the

prosecution might alter the allegations and reminded counsel that if it occurred it should not be to the prejudice of the defendants. *R v Beattie* (HC Akld, CRI-2003-004-2559, 5 July 2005, Allan J) included an argument about further particulars, but revolved around whether further particulars were required in that case. Not one of these cases was intended as authority for saying a summary of facts states the particulars of the case, and not one involved changing summaries of fact for the purpose of changing particulars. Indeed, if summaries of fact were the particulars, there would be no need for s 18 CPA at all. I reject Worksafe's argument which in effect denies the clear wording in ss 17 and 18 requiring a form of minimal formal pleading in criminal charging documents.

[40] In the present case, the first summary of facts was presented about a month after plea. The second summary of facts, widening the allegations four-fold, was served 26 August 2016, fifteen months after the alleged offence/s, and seven and a half months after plea. The report upon which that second summary was based had been in Worksafe's hands for over two months by that stage. The defence immediately challenged Worksafe in the form of the present application. There was no tardiness by the defendant.

Saving provision – s 379

[41] Section 379 CPA provides:

> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[42] Again, as this largely mirrors s 204 of Summary Proceedings Act 1957, older cases remain a good guide. Whether there is a miscarriage of justice is a question of fact in each case. A miscarriage can arise for various reasons; *it is always a matter of analysing the facts, deciding if anything went wrong, and if it did, deciding whether in the interests of justice it should be put right* (per Callander DCJ in *Police v Gilchrist* (1998) 16CRNZ 55.

[43] The Court must give full effect to the ordinary natural meaning of the language of s 379 (*Hall v MOT* [1991] 2NZLR 53). Section 379 cannot 'save' a nullity; therefore plainly Parliament intended that there would be cases which do not involve a nullity and yet cannot be 'saved'. Failings, errors and defects which do not amount to a miscarriage of justice can be cured by applying s 379. Failings errors and defects which constitute a miscarriage of justice cannot. Although some cases may speak of a gross miscarriage of justice, it is plain that, while gradations may exist, all that is required to bar the saving provision is a miscarriage of justice. In determining whether a miscarriage of justice has occurred, the court must have regard to all the circumstances (*Grace v Attorney-General* 29/11/89, Wallace J, HC Gisborne CP31/89). Where the prosecution withheld information, thereby placing the Court and the defendant at an unfair disadvantage in the conduct of the Court's usual business, a miscarriage of justice was held to have occurred (*R v Machirus* [2008] NZCA 477.

[44] In the Harkness Henry Lecture of 2006 (refer Courts of New Zealand website) His Honour Justice Grant Hammond said:

> It means a failure to reach the intended destination or goal, which in this case is "justice". Justice in and of itself is about distributions, about according persons their fair shares, and like treatment. Thus, one argument runs, fair treatment and the dispensation of criminal justice in a liberal, democratic society means that all individuals should be treated with equal respect for their rights and for the rights of others. It does not follow from this that individual rights are absolute; but it does follow (as the New Zealand Bill of Rights recognises) that it is rational to accept some limitations to preserve the rights of others, or at least competing rights.

His Honour then noted that Dr Andrew Ashworth, the Vinerian Professor of English Law at Oxford has said:

> That an individualistic, rights-based approach to miscarriages of justice should be adopted. A "miscarriage" should be said to occur whenever suspects or defendants, or for that matter convicted persons, are treated by the state in breach of their rights. This is said to occur because of a deficient process, or through the misapplication of laws, or because there is no factual justification for the applied punishment, or because suspects or convicted persons are treated adversely and in a disproportionate way by the state in comparison with the need to protect the rights of others or even the state itself.

[45] In *R v Duke*, Justice McClung of the Alberta Court of Appeal wrote, in reference to an appeal and the Canadian Criminal Code:

> The determination of whether a miscarriage of justice has occurred rests on broader considerations than those attaching to the demonstration of a substantial wrong. Proof of actual prejudice resulting from an error of law is not requisite to a finding that a miscarriage of justice has occurred. It may be enough that an appearance of unfairness exists.

[46] Logically if that breach of rights is significant and achieved in breach of statutory requirements in a way which cannot be said to be a mere slip, or an inadvertent error made in the context of what is otherwise a diligent approach, then that must be relevant to unfairness. It is clear each case must be assessed on its own facts.

[47] Relevant factors in this case must include laying the charge only just within the six month time limit, delay in obtaining expert advice, delay in amending, or serving the amended summary of facts, and significantly expanding the prosecution case by serving a significantly amended summary of facts 15 months after the alleged breaches. I accept the changes to the summary (which in submissions Worksafe admitted it relied upon to specify particulars) cannot be anything other than circumvention of the six month limitation period. Given the way Worksafe has presented its arguments in this hearing that was a deliberate tactic. There is obvious and marked disadvantage to the defendant arising from such 'shifting sands', resultant wasted costs and expenses, and the impact of delay. Parliament gave Worksafe six months to make its enquiries and take advice before committing to its charge, but it also gave Worksafe the opportunity seek an extension of time. Worksafe sought no extension in this case. However there is another factor.

[48] Mr Eaton submits, and I accept, that an undesirable practice appears to have developed in charges alleging a failure to take all practicable steps, and it is one which, for practical reasons, ought not to be encouraged. The specific failure/s relied upon are an element of the charge. It emerges clearly from the cases to which Worksafe has referred, that Worksafe has developed a practice of deliberately not specifying the failure/s relied upon, relying instead upon the summary of facts. The summary of facts however has no legal authority. It can be the subject of challenge

even in the face of a guilty plea. Most importantly however, it can be changed at the pleasure of the prosecution at any time (as occurred here), without the need for leave to amend the charge, without reference to a limitation period, and without oversight by the Court, which would of course be required if the charging document specified the failure/s and Worksafe wished to change or add to them. It is undesirable that the prosecution can in effect lay further charges, indefinite in number and scope, at any time up to the hearing, by taking deliberate advantage of its own non-specific wording in the charge it laid. In practical terms that approach actively discourages the defendant from promptly applying resources to the initial allegations. Any request for particulars is likely to result in a response indicating an expert report is awaited. In effect the defendant cannot prepare its case unless and until Worksafe states it will not change the allegations; the Court still cannot set the matter down until the defendant has had a reasonable time to then complete preparations, and this in a category one charge with a six month limitation period.

[49] It is even more undesirable that the prosecution should then cynically rely upon s 379 to cure obvious defects, when and if a defendant objects. If Worksafe is forced to turn to s 379 more than once on the same issue, it should examine its processes. Section 379 cannot be used routinely to avoid the plain meaning of s 17 CPA; it is there to ensure that a prosecutor failing to comply with it, will not be prevented from proceeding where there is otherwise good faith and a lapse. It is a saving provision where there has been a failure without any practical unfairness arising. Worksafe's submissions appear to indicate it would feel able, if it chose to change the case yet again, at any time prior to commencement of the hearing. Such an approach in a criminal prosecution (especially one which often involves complex allegations and the resultant use of experts) would circumvent the limitation period, frustrate the intention of NZBORA and the Criminal Disclosure Act, and the management provisions of the Criminal Procedure Act and Rules.

[50] The multiple failings here are plainly not merely of form; cumulatively, they relate to the very substance of the prosecution, striking at the plain intention of legislation (including NZBORA, and case management and disclosure regimes), the ability to prosecute within the limitation period, and the ability to defend this allegation (or allegations). Worksafe is also taking unfair advantage of its own

deliberate non-compliance with s 17(4) CPA, with resultant prejudice to the defendant arising from Worksafe's delay and changing stance.

[51] Is the situation irrevocable? Permitting amendment and allowing the prosecution to proceed would not be in the interests of justice. It is now too late to 'right the wrong' which has occurred to the defendant, this Court and the interests of justice. Firstly, Parliament made plain it expected Worksafe to file charges within six months, unless it sought and was granted an extension, which Worksafe chose not to seek. I have no evidence to explain Worksafe's delay, and no explanation for delay after the limitation period had expired. Secondly Worksafe's behaviour has frustrated the defendant's right to begin preparation promptly, and the Court's (and society's) right to expect both sides to prepare promptly. Ms Hemi must adjust her personal and working life following this accident; she continues to work for the defendant company having been retrained for an office-based role. Any witness employed by a defendant would want to give evidence as soon as possible. They would expect prompt disposition of the case. The defendant could begin to prepare its defence effectively only after any required amendments were allowed. The defendant could well argue it needs as much time to prepare as the prosecution has taken. If that were the case, case review would not occur until the end of August next year, and any fixture then allocated would be likely to be, at best, in early 2018. That would be nearly three years after an event which triggered the charge, which is fine-only with a statutory limitation period of six months. Amendment would necessarily ignore and breach that limitation period. Lastly, such delay, with or without any other considerations such as evidence becoming lost to a defendant through Worksafe's delay, would likely result in a stay. Amendment now would not remedy the situation, but it would compound the miscarriage of justice which has already occurred.

[52] Before leaving this topic I must address *Ministry of Business, Innovation and Employment v Centreport Limited* [2015] NZDC1. There His Honour Judge Hastings rejected a submission that the charge (similar to the charge here) was a nullity because it failed to specify the practicable steps the employer failed to take. Initially there were ten such alleged failings, reduced to seven at the hearing. His Honour noted this was not a 'systems' charge, but one related to the actual fatal accident

which had occurred. The Judge specifically found that with full disclosure, a full summary of facts setting out exactly what was claimed (and served when the charging document was served), and the late raising of the argument (at the end of the case) the charging document was not a nullity. The relevant paragraphs are [29] to [34]. The argument had been that as the charging document failed to provide particulars it was per se a nullity and never 'enlivened'. His Honour was not asked to address s 17(1) and did not do so. His Honour found that failure to provide particulars in the charge under s 17(4) did not render the charge null (a conclusion with which I agree), and s 379 'saved' the charge as on the facts of the case no miscarriage of justice had occurred.

[53] Mr Eaton submits respectfully that Judge Hastings erred in finding the provision of a summary of facts was provision of particulars, and in impliedly giving the summary of facts legal status, neither of which arguments was raised before His Honour. It was not argued that a miscarriage of justice occurred because the prosecution used loosely worded charges to avoid the limitation period. Nor was it argued that the consequence of (wrongly) elevating the summary of facts to the provision of particulars could permit the prosecution to add to and change the charge in significant ways at will, without oversight, and in ways, which, by fixing the limitation period and mandatory case management processes, Parliament patently never intended. The *Centreport* decision is a decision on its own facts; it does not purport to hold that a summary of facts constitutes particulars of a charge where particulars are required.

Conclusions

[54] In summary then, although the charging document is not a nullity, it fails to meet the obligations required under ss 17(1) and (4), and contains unacceptable uncertainties; to meet the minimum requirements at law it must be amended, but it cannot be amended in this case because a miscarriage of justice has occurred having regard to the following cumulative factors:

(a) The charge alleges multiple offences within a single charge in breach of s 17(1) CPA;

(b) The charge purports potentially to claim offending with reference to an unspecified period before 21 May 2015 which must be time-barred (with the words 'on or before 22 May 2015');

(c) The charge was laid as a non-representative charge yet Worksafe has acted as if it were free to add and remove allegations (involving elements of the offending to be proven beyond reasonable doubt) at will at any time;

(d) The extent of the changes in Worksafe's allegations has significantly altered the scope of the case, and materially prejudiced the preparation of the defence (both as to time and facilities); the obligation to fully and fairly inform arises upon filing the charge. Delay in discharging that obligation raises the risk of miscarriage, which risk increases with longer delays and greater changes to the allegations. That risk has become reality in this case

(e) Worksafe has delayed, significantly, in a case which, as originally laid, should have been concluded long ago; this delay impacts upon Ms Hemi and other witnesses as well as the defendant.

(f) The delays contravene the defendant's right to a prompt trial and proper facilities to prepare a defence. It must be remembered that the criminal procedure regime under CPA requires timely preparation. On a second appearance a defendant can be deemed to have pleaded not guilty. The system expects a defendant to react promptly to being charged. Witnesses can 'disappear' impacting upon ability to defend a charge. Therefore while a defendant is entitled to begin his preparation for hearing promptly under NZBORA, but he is also required to do so under CPA.

(g) Worksafe cannot in good faith point to a summary of facts served fifteen months after the claimed date of offending and say it has

promptly and fairly informed the defendant of the substance of the charge served nine months before;

(h) The practice adopted by Worksafe amounts to deliberate reliance upon a provision which is meant to be a saving provision, available in appropriate cases; it is being misused if Worksafe relies upon it routinely, if and when a defendant challenges sufficiency or validity;

(i) If Worksafe is permitted to continue to approach similar allegations of serious criminal offending in such a loose manner, it will serve to defeat the very purpose of the limitation period, the Criminal Disclosure Act and the case management procedures set out in CPA and Rules. There can be no justification for allowing one prosecuting agency such licence when it is denied to others;

(j) Worksafe's approach is unjustifiable; it is not the product of genuine error, occurring rarely. It is the result of a sustained approach. Yet requiring Worksafe to specify the failing relied upon will not prejudice Worksafe. It will merely require Worksafe to prosecute under the same rules as every other prosecuting agency. It must apply for leave to amend charges if it needs to do so, and it must quickly and diligently embark upon its investigative function (as parliament plainly intended).

(k) The only argument Worksafe advanced to justify the approach here and in the cases cited, was that it usually relies upon an internal inspector's report when first laying charges. It often engages an expert when and if a not guilty plea is entered. Some mention was made of resources, but that is not a matter for me. Neither is it an excuse for not complying with the law. It does have consequences however. A defendant pleading guilty will probably be sentenced on the basis of the enquiries of the Worksafe inspector. A defendant pleading not guilty may well be called upon to defend a far wider case as a result of expert involvement, and one that can be expected to be

> the subject of gross delays. That too seems to be an unfortunate approach from the interests of justice and the public, and the importance of policing work place safety.

[55] Accordingly as the charge breaches several aspects of s 17 CPA, and has been prosecuted in a way which has given rise to a miscarriage of justice, it cannot be amended or saved. It must be dismissed.

Has an abuse of process occurred?

[56] Strictly I have no need to address this argument. However, in the event I were to be wrong on the above findings, I must record that for the same reasons set out above, Worksafe has abused the processes of the criminal law and this Court in a way which requires the grant of a stay.

[57] I refer to *Fox v Attorney-General* [2002] 3NZLR 62. I conclude that the conduct of this prosecution is so inconsistent with the purposes of criminal justice that to proceed would tarnish the Court's integrity and/or offend the court's sense of justice and propriety, noting in particular the improper way in which separate and new charges are in effect being introduced in circumvention of the limitation period. Such an approach is unfair to a defendant but more importantly it is a misuse of the legal processes to flout statutory requirements. I am satisfied, extreme though such a measure is, if required to make an order, I should stay the charge. It is however not an order I am required to make in light of the earlier conclusions the charge must be dismissed.

[58] Certain other arguments were advanced by Worksafe, which I should address. Worksafe submits that by accepting the argument that Worksafe's approach to prosecutions circumvents the limitation period, Worksafe would never be able to amend charges. Plainly, s 133 CPA allows the Court to permit amendment. If a request is made to add further charges to a representative charge outside the limitation period, then refusal must be no more and no less than Parliament intended by creating the limitation period in the first place. Indeed, the limitation period would be meaningless if, as Worksafe submits, it can lay a generalised charge, without specifics, and then add to it at will. This would be no more than a 'holding

charge' and in itself that would be an abuse of process (*R v Brentford Justices, ex parte Wong* [1981] 1All ER 884, *R v Newcastle-upon-Tyne Justices, ex parte Hindle* [1984] 1 All ER 770). Worksafe's argument is self defeating as it discloses Worksafe's intent to breach the limitation period.

[59] Worksafe submits that as prejudice is the 'touchstone' the Court should not stop the prosecution as there is no prejudice to the defendant, as no trial date has yet been set. The delays which have occurred in this case are attributable to Worksafe. Worksafe elected to engage LCC two months after the not guilty plea was entered. Worksafe elected to engage an expert to advise in the conduct of the prosecution more than eleven months after the limitation period started running and more than five months after it had expired. The expert's report resulted in the amended summary (which Worksafe says defines the prosecution) being served nearly fifteen months after the limitation period started running, and nine months after it had expired. Worksafe was unable to provide its witness list at an already adjourned case review hearing in June 2016. If Worksafe confirmed it had supplied the full witness list, with disclosure of statements etc, and the final summary of facts, it could be said that would permit the defendant to now consider which witnesses were required for cross-examination and which witnesses it might itself wish to call. The case would then only become ready to set down when the defendant has had a reasonable time to consider its position. Apart from the fact it is unacceptable for Worksafe to rely upon its own dilatoriness to claim lack of prejudice because no hearing date has been allocated, the obvious financial and other prejudice to a defendant waiting for eight months to find out what is alleged against it must amount to prejudice in a category one charge with a six month limitation period.

[60] There is no basis to treat Worksafe prosecutions any differently from those of any other prosecuting agency. No-one has cited any legal or case authority for that proposition. Therefore the rules applying to any traffic or police prosecution will apply here, and vice versa. The system would grind to a halt if every police prosecution were to be conducted on the same basis as here.

[61] Accordingly, the charge must be dismissed. The matter is to be recalled on 6 December in the Ashburton District Court for that to occur.

J E Maze
District Court Judge