IN THE DISTRICT COURT
HELD AT WANGANUI

T971822

BETWEEN: **CROWN**

AND: **BRIAN RICHARD KEMP**

Date of Hearing: 15 May 1998

Date of Decision: 15 May 1998

Counsel: C Matsis for Crown
L Rowe for Accused

ORAL JUDGMENT OF JUDGE A J BECROFT

Introduction

This is an application under s.347 of the Crimes Act 1961. The accused faces four counts in an indictment, all specifying offences against the Resource Management Act 1991, (the Act) and which allege breaches of a Planning Tribunal consent order, allowing for the limited taking of Rimu and Miro trees from the accused's land. As he is perfectly entitled to do, the accused has elected trial by jury in respect of all four charges. The two counts the subject of this application, allege liability of the accused under s.340(1) of the Act in respect of the actions of an agent. Under that subsection, where an offence against the Act is committed by an agent, the principal is also liable.

The short but subtle point in this application, is whether there is any evidence upon which a jury properly directed could, or would, find a relationship of agency between the accused and Helilogging NZ Ltd, (Helilogging) who in the

immediate sense breached the consent order, by taking native timber outside the order's strict conditions.

Background Facts

The accused is the land owner of a farm in Bruce Road, in rural Wanganui, which contains stands of native timber including Miro and Rimu. Logging those trees is a non-complying activity under the Act and consent is required to do so. On 28 February 1994 the accused applied for such consent, to both the Wanganui District Council and the Manawatu-Wanganui Regional Council. After a protracted process, on 29 September 1995, a consent order for limited logging of native timber was made by the Planning Tribunal. That consent order relevantly provided as follows:

....

1. That there be no logging of the Eastern Block of the land, the subject of the application.

2. That a maximum of 60 trees be logged from the western block of the land, the subject of the application.

3. The extraction of the logs felled be carried out by helicopter.

4. That of the trees to be logged on the western block of the land, no more than 30 Rimu trees shall be logged, and no more than 30 Miro trees shall be so logged.

....

On 2 August 1994, before the consent order had been made, the accused and his wife entered into an agreement with Helilogging whereby the accused and his wife as Grantor, allowed to Helilogging as Grantee, rights to cut, remove and sell certain millable native timber on the accused's land. Essentially it seemed to be an agreement to sell specified indigenous timber. That agreement relevantly provides as follows:

Clause 2 obliges the Grantee to pay to the Grantors royalties for the timber cut and felled, at a "stump price";

Clause 5 requires the Grantee to furnish the Grantors with full and accurate tallies of all logs milled, at monthly intervals.

Clause 6(c) provides that the Agreement shall be subject to the following provision:

> (c) If trees have to be left standing because of any Resource Management Act they shall be deemed non-millable and may be left standing.

On any analysis, and with respect, that is an inelegantly drafted provision to say the least. After argument it was accepted that in essence it makes the trees the subject of the agreement, subject to any Resource Management Act restrictions. There can be no other sensible interpretation of that provision and it is clearly on this basis that the parties to the contract proceeded.

Clause 9 makes the Grantee responsible for ensuring that all timber milled is within the boundaries of the said land;

Clause 11 gives the Grantors the right to enter such of the land which does not contain millable timber, to allow for their farming purposes, provided that in carrying out such uses the Grantors will cause as little interference as possible to the Grantee's logging and milling operations.

Clause 16 obliges the Grantee to fully comply with the Accident Compensation Act 1972 or its amendments.

> Clause 19 allows the Grantees to assign the rights contained in the agreement; consent to such assignment is not to be unreasonably withheld by the Grantors.

The logging operation commenced on 5 December 1995. Helilogging engaged the services of a professional helicopter pilot, Mr Thum. He and the director of Helilogging (Mr Ford) met with the accused on his property. Mr Thum flew the accused, in his helicopter, around both the western and eastern stands of native forest. For the purposes of this argument I am prepared to accept that Mr Kemp did not inform Mr Thum that logging could not take place in the eastern block. It seems the purpose of that helicopter survey was to establish the boundaries within which the logging could take place. Mr Thum then ferried workmen into the western block to begin logging. He saw the accused possibly on one more occasion.

Before logging commenced, as is recorded in the depositions, Mr Ford accepted he was given a copy of the Resouce Consent. He said:

> "My understanding at the time of the restrictions contained in that consent - I didn't read it at all. I was given a copy of the consent the day we started the block. On the day I got to the block by helicopter the pilot was Eric Thum. His relationship to Heli-Logging NZ Ltd, he worked for the company. When I arrived at the Kemp property; when we landed Brian Kemp came down to the helicopter, passed me the Resource Consent and said I had better read it. Then he got into the helicopter and flew the boundaries with Eric Thum. I couldn't say how long that took, maybe 10-15 minutes. I didn't read the Resource Consent."

And later on,

> "I couldn't tell you which part, and later on Mr Kemp didn't say anything about the resource restrictions in the consent."

An adjoining neighbour, during the logging process, apparently complained that logging was taking place, apparently in the eastern block and therefore contrary to the consent order. Investigations proved that to be so.

In fact 120 trees, comprising 1 Rimu and 119 Miro trees, had been removed from both the western and eastern blocks contrary to the Planning Tribunal order, leading to this prosecution.

Issue

Section 340(1) of the Act, provides as follows:

> **Liability of principal for acts of agents**
>
> (1) Where an offence is committed against this Act by any person acting as the agent or employee of another person, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he, she, or it, personally committed the offence. (Underlining added).

The issue in this case is whether Helilogging acted as the agent of the accused. There is no suggestion that Helilogging was the employee of the accused. To that issue of agency I now turn.

Agent

The term 'agent' is not defined in the Act. General principles must therefore be relied upon.

Mr Rowe for the applicant accused, referred me to **Hallsbury's Laws of England, 4th Edition, Volume** 1(2) p4. There, it is emphasised the word 'agency'

> ".....is used to connote the relation which exists where one person has an authority or capacity to create legal relations between the person occupying the position of principal and third parties.

> The relation of agency arises whenever one person, called the agent, has the authority to act on behalf of another, called the principal, and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of the principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen."

Mr Rowe also pointed to two extended uses of the word 'agent'. Firstly, in a business non-legal sense, to refer to a distributor as in the case of the appointment of a sole-selling agent, exclusive agent or authorised agent. Secondly, the word 'agent' is frequently used to describe the position of a person who is employed by another to perform duties, often of a technical or professional nature, discharged as that other's alter ego, and not merely as an intermediary between the plaintiff and third party.

Mr Rowe also referred to the classic text **Bowstead on Agency,** 15th Edition (1985). There is emphasised the distinction between agent, servant and contractor. The degree of control exercised is usually seen as determinative, together with the scope of the authority.

The interpretation of "agent" under this subsection has been given detailed analysis by Judge Bollard in what appears to be the leading case on this issue: **Auckland Regional Council v Puketutu Island Timber Company** (DC, Henderson CR. No: 2090012515-6, 2/4/93). I do not propose to repeat all that he set out on pages 19-21 of his judgment, but I adopt it completely. As he stated, at page 19:

> "It has been said often enough that the law as to agency is not difficult to grasp as in concept, but that its full exposition by reference to manifold cases from different areas of the law is a very different matter."

The conclusion that he reaches as to the meaning of agency is entirely in accord with that submitted by Mr Rowe and the principles the defence relied upon.

Indeed, Judge Bollard's definition has been accepted in cases since, see for instance **McKnight (Auckland Regional Council) v Horticultural Processes Ltd and others,** (District Court, Henderson, Crn 2090016530, 26 November 1993). There, Judge Kenderdine entirely adopts and follows the principles outlined by Judge Bollard.

In my view, this approach is entirely consistent with the wording of s.340(1) - which specifically distinguishes between an agent on the one hand and an employee on the other. I am also informed that an amendment, not yet in effect, but passed by s.22 of the Resource Management Amendment Act 1994/105, adds to the words "agent" or "employee", the words "contractor" or "subcontractor". That seems only to emphasise that the distinctions and meanings to be given to "agent" and "employee" are important and must be given their normal legal meaning, subject to general principles of statutory interpretation.

Mr Matsis for the Crown, advanced an enthusiastic argument that the definition of agency should be somewhat greater and more expansive than the traditional approach. He carefully outlined the general provisions of the Act. He emphasised that a resource consent was here needed before the land could be logged. Under s.88 any person such as Helilogging could apply for such a resource consent. The resource consent runs with the land and may be transferred. Under s.134(3) the consent can be transferred. Under s.138 the resource consent can be surrendered, so overriding as it were, any contractual provisions. The thrust of Mr Matsis' careful argument was that as the person to whom a resource consent is granted has ultimate control of it (until it be "transferred"), and that in accordance with the overall scheme of the Act, the relationship of principal and agent should be construed between the resource consent holder and any person or entity who carries out work under the

supposed authority of the resource consent. Mr Matsis urged me to accept that only this interpretation would advance the provisions of the Act. After careful consideration I am not able to accept that argument; in my view the definition of "agent" should be interpreted in the normal way, as is contended for by the applicant accused.

Is Helilogging the Agent of the Accussed?

Having set out those principles as to agency, it seems to me that the conclusion here is straightforward and must be that the accused and Helilogging are not in a relationship of principal and agent. I say this for three reasons:

1. Firstly, the nature of contractual/legal relationship. The written agreement between the accused and Helilogging is essentially one of sale and purchase of the trees. Neither in substance or form does it create any relationship of agency. Under the agreement, Helilogging does not have the capacity to create legal relationships between the accused and the third parties. Neither did the accused have any effective control over Helilogging.

2. Secondly, the practical relationship between the two parties clearly shows there was no control by the accused over Helilogging and there was no authority for Helilogging to act as the accused's agent. The following matters of evidence are of assistance:

   (a) Helilogging employed Mr Thum to fly a helicopter and ferry its cutters into the western and eastern block. The helicopter belonged to Helilogging. Mr Thum was a pilot for hire, an independent contractor to Helilogging - not to the accused.

   (b) The accused had seldom met with Mr Thum or Mr Ford, other than at the commencement of operations and certainly exercised no practical control over Helilogging's operations on his farm.

(c) As is emphasised in the evidence, Mr Thum conceded that he was working under the direction of Mr Ford and considered him his boss.

(d) He also agreed that the cutters would regard Mr Ford as their boss also.

(e) In the course of logging, a second helicopter was required. That was engaged entirely by Helilogging and was provided by Helilogging, which entered into a contract with the second helicopter's owners.

3. Thirdly, the timber logged and extracted from the property was sold directly by Helilogging, independently and without reference to the accused, to a purchaser third party. That action to me it seems is entirely inconsistent with an agency relationship. Essentially the trees, although subject to a "Romalpa" clause in the agreement, became the property of Helilogging. They were free to contract with whom they wished to on-sell the logs. There was certainly no remote possibility that they were acting as Mr Kemp's agent when they did so.

Put another way, Mr Rowe helpfully suggested that there were at least five possible "relationships" by which the timber could have been logged and extracted.

Firstly, the accused could do it himself. Secondly, the accused could employ others to do it for him as his employees. Thirdly, the accused would contract an agent to log and extract the timber on his behalf. Fourthly, he could engage a contractor to do it. Fifthly, he could entirely sell all rights in the timber where it stood for another party to log and extract the timber.

I agree that when the facts here are carefully analysed, it is the fifth possibility that most correctly describes the relationship between the accused and Helilogging.

In essence, the situation here seems to me to be on all fours with the case of **Wood v McGrath** (DC, Greymouth, Crn 2018004860, 19 April 1993, Judge Skelton). There the defendant owned a mining licence and a water right. Mr Piner, acting under the authority of that licence and right, mined gold on Mr McGrath's property. In the course of that he diverted a water course such that water to the nextdoor neighbour's property dried up. Mr McGrath was prosecuted on the basis that Mr Piner was his agent. There, the prosecution argued the evidence established Mr Piner was not Mr McGrath's agent because at all material times Mr McGrath was the owner of the licence, held the water right and retained sole responsibility for public liability insurance and must be seen to have had ultimate responsibility for the way the licence and right were exercised. However Judge Skelton concluded that there was no relationship of principal and agent between the two. Effective day to day control of the whole mining operation had passed to Mr Piner, who amongst other things, assumed responsibility for reporting to the Ministry of Commerce and paying all the mining rentals and rates on the property. He also assumed full responsibility for restoration following mining. While there may be minor differences between this case and the factual situation in **McGrath,** essentially it is indistinguishable and the conclusion I reach here is entirely consistent with that helpful decision.

From a wider perspective, there seems to me to be no policy reasons why I should take a different approach. It is not necessary for a wider definition of agent to be adopted to make the Act work. In my view it would have been perfectly appropriate here to lay a parallel prosecution against Helilogging and Mr Ford. Indeed, that was done. For reasons which have been explained, but which on the depositions evidence I cannot quite grasp, those prosecutions have been withdrawn and discontinued. Certainly, on one interpretation of section 3A of the Act, such a prosecution would have been perfectly permissible.

Conclusion

Helilogging and/or Mark Wayne Ford were never the agent of the accused and he had no relationship with them as their principal. There is no evidence on which such a conclusion could properly be based. A necessary jury direction to that effect would preclude conviction of the accused in respect of Counts 2 & 3 in the indictment, irrespective of which test under section 347 I adopt.

Consequently, I rule in respect of both those counts, that the accused not be arraigned and that he be discharged in respect of them. This will allow the Court to focus on what is essentially the real issue; i.e. whether the accused "permitted" a contravention of the Planning Tribunal consent order.

A J Becroft
District Court Judge