IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI-2015-454-3
[2016] NZHC 348

BETWEEN	VICTOR DAVIS Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 3 February 2016

Counsel: P Knowsley for Appellant
A Longdill and L Moffitt for Respondent

Judgment: 7 March 2016

JUDGMENT OF WILLIAMS J

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[1] Mr Davis was convicted following a Judge-alone trial of, without reasonable cause, obstructing two WorkSafe inspectors in the lawful execution of their duties. This is an offence under s 48 of Heath and Safety in Employment Act 1992 (the Act).

[2] Mr Davis appeals against conviction. He argues that the inspectors were not lawfully exercising or performing any power, function or duty under the Act as required by s 48.

The facts

[3] Mr Davis is a qualified builder but not employed in that trade. At the relevant time he was engaged in building a house on a property in Otaki owned by his family trust.

[4] Mr Davis is normally resident in Western Australia on an oil and gas construction site. He works four weeks on, one week off, and had been spending accumulated weeks off back in New Zealand building the house in Otaki. His evidence was that he took extra leave in February to finish the house as it was for his

daughter who had married on 8 February. She and her husband were going to live in it.

[5] Mr Davis had in fact been living at the site – that is inside the nearly completed house – for 18 days, as he was progressively completing it. Electricity came by way of an extension cord from the dwelling next door owned by his ex-wife. Water was connected to the site but there were no taps so he showered next door. There was no functioning kitchen. Sewerage services were connected but Mr Davis had to use a bucket to flush the toilet. Mr Davis had set up a bed for himself in the building and had a toaster and microwave but there was no other furniture or appliances at the site.

[6] On 20 February 2014, an inspector, Mr Lobb, was driving through a new subdivision in Otaki when he came across the subject site with the house under construction as I have described it. A scaffold at the front of the house looked to him to be unsafe and he decided to take a closer look. Mr Lobb entered the property and began to take photographs of the scaffolding. Mr Davis remonstrated with him, refused to give his name or discuss the scaffolding and marched Mr Lobb off the property.

[7] The following day Mr Lobb returned to the site with a second inspector, Mr Wells. Mr Davis refused to talk to them or answer their questions and (I infer) marched them off the site again.

[8] According to the inspectors' evidence, Mr Davis was aggressive and abusive. I note that Mr Lobb identified two men at the front of the site cleaning their tools and, according to the Judge in the District Court, he "glimpsed two other people at the back of the property".[1] Mr Davis, the Judge accepted, told the two inspectors on 21 February that the site was his own property and he was building the home for himself. But the Judge accepted the inspectors' evidence that Mr Davis did not tell them he was currently living or staying at the site.

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1 *WorkSafe NZ v Davis* [2015] NZDC 3632 at [11].

Relevant provisions

[9] Section 48 provides:

> No person shall without reasonable cause—
>
> (a) obstruct, delay, hinder or deceive; or
>
> (b) cause to be obstructed, delayed, hindered, or deceived,
>
> any inspector while the inspector is lawfully exercising or performing any power, function or duty under this Act

[10] The issues at first instance and on appeal are essentially questions of statutory interpretation. The overarching question is whether the inspectors, when they entered the property for the purpose of inspecting it, were lawfully exercising any power, function or duty under the Act. The answer to that question turns variously on whether:

(a) the site was a "place of work";

(b) the building being built was a "home"; and

(c) irrespective of the answers to those questions, whether the inspectors had an implied power to enter the site to determine if it was indeed a place of work and/or a home.

Section 30

[11] Section 30 sets out the functions of inspectors.

> The functions of an inspector are—
>
> (a) to help employers, employees, and other persons to improve safety at places of work, and the safety of people at work, by providing information and education; and
>
> (b) to ascertain whether or not this Act has been, is being, or is likely to be complied with; and
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> (c) to take all reasonable steps to ensure that this Act is being complied with; and

(d) all other functions conferred on inspectors by this Act or any other enactment.

Section 31

[12] In pursuit of the functions in s 30, s 31 identifies the inspectors' powers of entry and inspection. I set out relevant parts of the provision below, but in brief, and as relevant, inspectors may enter any "place of work" for the purpose of inspection or inquiry but a place of work that is a "home" may not be entered without a warrant issued by a District Court Judge on the sworn application of an inspector who is satisfied, on reasonable grounds, that the home is a place of work and entry into it is necessary for the purpose of the Act.

[13] Section 31, relevantly, is in the following terms:

> (1) For the purpose of performing any function as an inspector, any inspector may at any reasonable time enter any place of work and—
>
> (a) conduct examinations, tests, inquiries, and inspections, or direct the employer or any other person who or that controls the place of work, to conduct examinations, tests, inquiries, or inspections:
>
> (b) be accompanied and assisted by any other people and bring into the place of work any equipment necessary to carry out the inspector's functions:
>
> (c) take photographs and measurements and make sketches and recordings:
>
> (d) require the employer, or any other person who or that controls the place of work, to ensure that the place of work or any place or thing in the place of work specified by the inspector is not disturbed for a reasonable period pending any examination, test, inquiry, or inspection:
>
> (e) require the employer, or any other person who or that controls the place of work, to produce documents or information relating to the place of work or the employees who work there and permit the inspector to examine and make copies or extracts of the documents and information:
>
> (f) require the employer, or any other person who or that controls the place of work, to make or provide statements, in any form and manner the inspector specifies, about conditions, material, or equipment that affect the safety or health of employees who work there.

(1A) An inspector may do any of the things referred to in subsection (1), whether or not—

(g) the inspector or the person whom the inspector is dealing with is in the place of work; or

(h) the place of work is still a place of work; or

(i) the employer's employees work in the place of work; or

(j) the person who was in control of the place of work is still in control of it; or

(k) the employer's employees are still employed by the employer; or

(l) in respect of a document or information, the document or information is—

(i) in the place of work; or

(ii) in the place where the inspector is; or

(iii) in another place.

(2) Notwithstanding subsection (1) or subsection (1A), an inspector shall not enter a place of work—

(a) that is, or is within, a home; or

(b) through a home,—

except with the consent of an occupier or pursuant to a warrant issued under subsection (3).

(3) A District Court Judge who, on application made on oath, is satisfied that there is reasonable ground for believing that a home—

(a) is a place of work or has a place of work inside it; or

(b) is the only practicable means through which a place of work may be entered,—

may issue to an inspector named in it a warrant to enter any part of the home that is, or is the only practicable means through which the inspector may enter, the place of work.

Section 2

[14] Finally both home and place of work are exhaustively defined in s 2 of the Act in the following terms:

> **home** means a place occupied as a dwelling house; and includes any garden, yard, garage, outhouse, or other appurtenance, of a home
>
> **place of work** means a place (whether or not within or forming part of a building, structure, or vehicle) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee),—
>
> (a) where the employee comes or may come to eat, rest, or get first-aid or pay; or
>
> (b) where the employee comes or may come as part of the employee's duties to report in or out, get instructions, or deliver goods or vehicles; or
>
> (c) through which the employee may or must pass to reach a place of work.

District Court decision

[15] In the District Court, Her Honour Judge Edwards found that Mr Davis did obstruct the inspectors in the lawful exercise of their duties and did so without reasonable cause.

[16] The Judge found that the inspectors had an implied authority to enter the site to make inquiries for the purpose of determining whether the Act "is being, or is likely to be complied with" in terms of s 30(b) and so were entitled to undertake "inquiries" in terms of s 31(1)(a).

[17] The Judge may well have accepted that the site was a place of work (it is not entirely clear from the judgment) but in any event rejected the suggestion that it was a "home" in all of the circumstances of the case. That is why no warrant was required for entry.

Submissions

[18] For the appellant, Mr Knowsley submitted that the inspectors had no implied power to enter the site to determine whether it was a workplace and not a home. He submitted that the powers of entry only relate to places of work and there was no "reasonable grounds to believe" clause that entitled inspectors to enter a site if they thought it was, or could be (on reasonable grounds), a place of work. In the absence

of such provision or equivalent, the power of entry onto the private property of another could not simply be implied.

[19] In short, Mr Knowsley submitted, a site is either a workplace or not, and if it is not, any entry is unlawful.

[20] In this case, Mr Knowsley submitted that the site was not a place of work because the house was not being built for gain or reward in terms of the s 2 definition. In any event, Mr Knowsley submitted, even if it was a work place, it was also a home and a warrant issued by a District Court Judge was required for entry. Mr Knowsley submitted that the facts supported the proposition that Mr Davis was treating the property as a dwelling house as he had been living there for 18 days. Either way, he submitted, the entry was unlawful and Mr Davis was entitled to summarily see the inspectors off his property without co-operating in their inquiries.

[21] Ms Longdill for WorkSafe New Zealand submitted that the inspectors had an implied power to enter the site to determine whether it was a place of work and not a home. To apply the appellant's standard, Ms Longdill submitted, would undermine the inspectors in good faith exercise of their duties and therefore would also undermine the purpose of the Act. In circumstances such as these, she submitted, it is unworkable to require inspectors to determine the status of the site before entering it if, to the reasonable observer, it looked like a place of work and not like a home (at least not on 20 and 21 February), and there is no independent means of verification.

[22] Ms Longdill pointed out that under s 31(3) inspectors may obtain a warrant to enter a home if they have reasonable grounds for believing that it is a place of work. It would be strange indeed that the legislature intended that there be a legal means to achieve entry into the intimacy of the home environment if there is reasonable suspicion, but no means at all in respect of orthodox work sites unless it can be conclusively shown beforehand that they are places of work.

[23] Ms Longdill also argued that the learned Judge was correct in finding that the site was not a home in terms of s 2 of the Act. Ms Longdill submitted that the

appellant was not living there permanently and the definition does not cover temporary accommodation of the spartan kind in evidence in this case.

Analysis

[24] Given the way in which the matter was argued before me, I intend to undertake my analysis in three steps as follows:

(a) Was the property a "place of work"?

(b) Was the property a "home"?

(c) Was there an implied power (exercisable on reasonable grounds) to enter the property in order to determine whether it was a place of work?

[25] I turn now to address those questions in order.

Was the property a "place of work"?

[26] Essential to the definition of place of work is that it must be a place, in terms of the definition in s 2, "where any person … is working … for gain or reward".

[27] Mr Davis was not being paid. Gain or reward means, as Mr Knowsley submitted, payment in cash or kind – that is, for compensation in some form directly proportionate to the services provided at the work place. In *Department of Labour v Berryman*, Judge Abbott articulated the test in these terms:[2]

> The concept of working for gain or reward predicates a direct and quantifiable benefit in money or money's worth rather than a nebulous and unquantifiable benefit of a clearly indirect nature.

[28] I agree with the essential point and respectfully adopt his Honour's approach. It is clear that Mr Davis was not working for gain or reward in the sense utilised in the Act.

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2 *Department of Labour v Berryman* [1996] DCR 121 at 132.

[29] It should be noted however that although the Act is called the Health and Safety *in Employment* Act, there are specific volunteer provisions. Section 5 recognises that volunteers should also have their health and safety protected while working. Section 5(e) includes as a purpose of the Act:

> Recognising that volunteers doing work activities for other persons should have their health and safety protected because their wellbeing and work are as important as the wellbeing and work of employees.

[30] Sections 3C and 3D pick up on this purpose. Section 3C applies if:

> A volunteer does work for another person (being an employer or self employed person) ... and the volunteer does the work on an ongoing and regular basis ... and the work is an integral part of the business of the employer or self employed person.

[31] If the situation meets that description, then part 4 of the Act (which contains s 31 – the applicable entry section here) applies "with all necessary modifications". It is perhaps possible to argue that in the case of volunteers, the terms of s 3C require the definition of "place of work" as used in s 31 to be modified so as to include a place where no-one was being paid. It might be argued that was a necessary modification to the statutory definition which after all begins with the standard caveat "unless the context otherwise requires".

[32] Section 3C is not however intended to apply to the work of *all* volunteers. It only applies, as I have set out, where the work is an integral part of the business of an employer. It seems therefore to apply to volunteers working alongside or in a role analogous to employees. On any view of it, Mr Davis was not in such a position when working alone or with family members to build a house for his daughter on family trust land.

[33] As I noted, the inspectors identified other people on the site when they arrived, but there is no evidence of who they were beyond the evidence of Mr Davis and his son that these were family members visiting rather than workers. In the absence of clear evidence to the contrary, there is no basis upon which a court can go behind that explanation. Section 3C does not apply.

[34] Section 3D applies to all other volunteers not covered by s 3C. Part 4 is not expressly applied in the section, so there is no express inspection and entry power in the circumstances covered by s 3D. Rather, subsection (2) imposes a more general obligation:

> The person for whom such a volunteer does the work activity should take all practicable steps to ensure the health and safety of the volunteer while he or she is doing the work activity, in particular by taking hazards into account when planning the work activity.

[35] And in relation to inspectors, subsection (3) provides:

> If an inspector becomes aware of a significant hazard relating to the work activity, the inspector must, as soon as practicable, contact the person for whom the volunteer is doing the work activity (or the person's representative) to discuss means of eliminating, isolating, or minimising the hazard.

[36] Subsection (4) expressly excludes the application of ss 39, 41, and 49. Unlike s 3C, there is no specific provision applying part 4 "with all necessary modifications". It must be concluded therefore that in relation to volunteers not meeting the description in s 3C, part 4 (including s 31) and "place of work" are not able to be modified to exclude the gain or reward requirement.

[37] It follows that the site in this case was not a place of work within the meaning of the Act and there was no express power of entry for the purposes of inquiry.

Was the property a "home"?

[38] While strictly unnecessary, for completeness I turn now to address the second question.

[39] Whether or not a place of work, a home may not be entered by a WorkSafe inspector without an inspection warrant issued by a District Court Judge. As I have set out above, "home" is exhaustively defined as a place occupied as a dwelling house and includes the usual curtilage associated with a dwelling. "Dwelling house" is defined in the New Zealand Oxford Dictionary as "a house used as a residence,

not as an office etc".[3] The Collins Dictionary defines "dwelling" as "a place of residence",[4] and the Chambers Dictionary defines "dwelling house" as "a house used as a dwelling in distinction from a place of business or other building". To dwell is "to abide or reside".[5] In my view, inherent in the words of the statutory definition is a sense of reasonable permanence – to dwell, abide or reside.

[40] In this case, Mr Davis was occupying the building for the time being but he was not occupying it as a dwelling house. There was no intention that it be his permanent residence, indeed the intention was that the permanent occupant be his daughter and her new husband. The infrastructure to support Mr Davis' occupation of the building was spartan to say the least – no running water, no electricity reticulation except by way of an extension cord to the house next door, sewerage connection completed by Mr Davis himself requiring a bucket to achieve flush, a bed, microwave and toaster but nothing more. Mr Davis clearly only intended to stay at the house while he finished it. Looking at the photos of the point to which construction had reached at the relevant time, this was perhaps a period of no more than a week or two.

[41] I consider the circumstances of Mr Davis' occupation of the site are too transitory to meet the statutory description of "home". Setting aside the question of whether it was a place of work, it was in my view no more than a construction site temporarily occupied by Mr Davis. He did not "dwell there" and it was not yet a "dwelling house". Mr Davis dwelled in Australia and the dwelling house was not yet complete. The circumstances in which Mr Davis found himself were more akin to a temporary camp site than a dwelling house that carries, in my view, a sense of permanence.

[42] I conclude therefore that the site was not a "home" for the purposes of s 31.

[43] That conclusion does not of course assist WorkSafe New Zealand in light of my finding that the site was not a place of work. The prosecution therefore succeeds or fails on the final question of whether a right of entry can be implied in order to

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3 *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 334.
4 *Collins English Dictionary* (10th ed, Harper Collins, Glasgow, 2009) at 517.
5 *The Chambers Dictionary* (11th ed, Chambers, Edinburgh, 2008) at 480.

determine whether or not the site was a place of work provided there are reasonable grounds to believe that it was. I turn now to address that question.

Was there an implied power of entry?

[44] Whether or not the site in question in this case was a place of work, it certainly looked like one. Photographs adduced in evidence show a standard residential construction site with the building nearing completion. How could the inspectors have known that it was not a place of work without the ability to enter the premises and ask relevant questions? Ms Longdill is well justified in arguing that it makes no sense for the statute to contain "reasonable grounds" flexibility in obtaining authorisation to enter a home that may contain a work place, without also incorporating a similar degree of flexibility in relation to places of work that are not (or, as here, not yet) homes. Surely, one would have thought, protection against entry to those sites is far less necessary.

[45] It is clear to me that the legislature has left a lacuna in the statutory regime. It should have contained an express provision entitling inspectors to enter a property in respect of which there are reasonable grounds to believe it is a place of work if only to determine whether in fact it is such a place. The question for me is whether it is consistent with the role of this Court to, by the device of implication, plug that gap.

[46] In certain circumstances it is appropriate for the Court, of necessity, to read in a power that is not expressed in the relevant statute. Indeed this device is well established in New Zealand jurisprudence. In particular, "statutes conferring powers on officials are often held to imply other powers that are necessary to make the original powers effective."[6] The Courts have, however, expressed understandable caution as to how far it should go.

[47] Three examples will suffice. In 1964, an Act empowering councils to construct waterworks "for supply of pure water"[7] was held by the Privy Council to

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6 At 328.

7 Municipal Corporations Act 1954, s 240.

imply the power to add fluoride to that pure water.[8] This was on the basis that truly pure water would be "a most unappetising and unsatisfactory liquid"; and so rather than being required to provide the water in its natural form, the council had, as a matter of practical necessity, to be empowered to add and remove substances from it.[9]

[48] Another example concerns the powers of social workers under a warrant giving them the power to enter premises and search for a child, and to remove the child if satisfied that he or she is suffering serious neglect.[10] In *R v Kahu* the Court of Appeal found that the power to remove the child also implied the power to open cupboards to check for the adequacy of food supplies in the house.[11] This was because it was necessary for the social worker to take appropriate steps, such as checking on the physical condition of the child, the living conditions and the supply of food and other necessities, in order to make the statutory assessment that the child was suffering serious neglect.[12]

[49] A final example relates to the ambit of warrantless entry to prevent offence or respond to risk to life or safety under s 14 of the Search and Surveillance Act 2012. The section, unlike its predecessor,[13] does not include the words "by force if necessary". However, the Court of Appeal in *Ashby v R* found that Parliament did not intend in the 2012 reform to make forcible entry unlawful in the circumstances set out in s 14(2), as that would have been a radical departure from the prior common law position. Parliament could not be taken to have turned its mind to such a change.[14] In addition, given that the power in s 14 only applies in situations where there is a pressing need to enter, and given that the use of force is authorised in less urgent circumstances, it must have been implicit in more pressing circumstances.[15]

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8 *Attorney-General ex rel Lewis v Lower Hutt City* [1965] NZLR 116 (PC). There is similarly an implied power to fluoridate in the Local Government Act 2002: *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834.

9 At 122.

10 Children, Young Persons, and their Families Act 1989, s 39.

11 *R v Kahu* [1995] 2 NZLR 3 (CA).

12 At 5-6.

13 Crimes Act 1961, ss 317(1) and 317(2).

14 *Ashby v R* [2013] NZCA 631, [2014] 2 NZLR 453 at [53].

15 At [55].

[50] An example where the Court found the line had been crossed into impermissibility may be found in the Court of Appeal decision in *Transport Ministry v Payn*. There, a majority of the Court (Woodhouse and Cooke JJ) found the power to administer a breath test does not imply a power to enter and remain on private property for that purpose. Woodhouse J was of the opinion that if the Transport Act had an implied power for a traffic officer to enter and remain on private property against the will of the occupier, then there could be no logical basis in the language of the statute for limiting that right. An unlimited right, which included a right of forcible entry, would, Woodhouse J considered, be too great an intrusion on property rights, privacy and civil liberties. Parliament cannot have intended to have overridden these by inference. He said, "I do not think there is a practical means of defining with any sort of clarity the point up to which a non-forcible right of entry could be maintained".

[51] Cooke J based his opinion in *Payn* on the grounds that it was not sufficiently clear and obvious what the proposed implied power would be – despite his view that Parliament did not intend for common law property rights to defeat the Transport Act charges. The fact that there was a range of judicial opinion on the issue suggested that "in defining the extent of any rights of entry the courts would pass beyond interpreting what Parliament has said; they would be speculating about the intention of Parliament or legislating themselves."

[52] Thus, in the end it was a combination of the importance of property rights and the lack of indicators by which the ambit of the intrusion could be calibrated that proved fatal to the implied power.

[53] That case is not akin to the present one. Here the implied power of entry could only be for the purposes of determining whether the site is a place of work. Whether an offence under the Act has been committed is an entirely different matter. All that is implied is the power to enter the site and if necessary to make inquiry of the site's occupants in order to determine whether the Act applies at all. This is a minor intrusion compared to that considered in *Payn*.

[54] The permitted intrusion is thus self-defining and self-limiting. And it must be limited to situations where the inspector has reasonable grounds to believe that the site is a place of work. This is consistent with the provision for entry warrants in relation to homes. The inspector in this appeal clearly did have such reasonable grounds, as the property appeared from the outside to be a construction site.

[55] The present case is somewhat analogous to *Kahu*. The statutory power to remove a child if the social worker was satisfied that the child was suffering serious neglect could only be effective if there was also an implied power to open the cupboards and take other actions to assess whether the child was indeed suffering neglect triggering the statutory power in issue. Similarly, in this case, the inspectors' powers to inspect places of work only makes sense if inspectors also have the power to determine whether a work site is, in fact, a place of work.

[56] A system of inspection that requires inspectors to guess at the legality of their actions, with the true position only being obvious after the event, is unworkable and inconsistent with a regime designed to make work places safer for those engaged within them. Indeed the potential chilling effect on the activities of the inspectorate of such a situation would be the very antithesis of the Act's underlying purpose.

[57] Without such implied power for work sites generally, the collateral ability to seek a warrant in relation specifically to entry into a home appears to make little sense.

[58] I find therefore that the WorkSafe inspectorate has an implied power to enter a site and make inquiries of its occupants to determine whether it contains a place of work, in the event that:

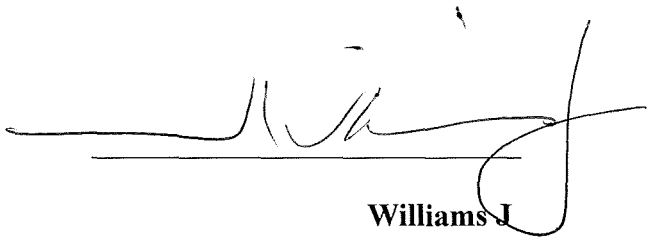
(a) it is not perfectly clear that the site does indeed contain such a place; and

(b) the inspector nonetheless has reasonable grounds to believe that it does.

The inspectors in this case were therefore lawfully exercising powers under the Act.

Disposition

[59] The appeal must be dismissed accordingly.



Williams J

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