IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2021-463-55
[2022] NZHC 556

BETWEEN	DANNY JOHN CANCIAN First Appellant
	THE ENGINEER LIMITED Second Appellant
	BRUCE JOHN CAMERON Third Appellant
AND	TAURANGA CITY COUNCIL Respondent

Hearing:	28 February and 1 March 2022
Appearances:	W T Nabney for First Appellant G Allan and M Beech for Second and Third Appellants R J A Marchant and N A Speir for Respondent
Judgment:	28 March 2022

JUDGMENT OF LANG J
[on appeals against conviction and sentence]

This judgment was delivered by me on 28 March 2022 at 10.30 am.

Registrar/Deputy Registrar

Date……………

Counsel/Solicitors:
W T Nabney, Tauranga
G Allan, Wellington
M Beech, Tauranga
R Marchant, Auckland
N Speir, Rice Speir, Auckland

[1] These appeals relate to convictions entered against the appellants following a lengthy Judge-alone trial in the District Court at Tauranga. In a decision delivered on 10 December 2020 (the liability decision), Judge P G Mabey QC convicted the appellants on several charges laid by the Tauranga District Council (the Council) under s 40 of the Building Act 2004 (the 2004 Act).[1] This prohibits the carrying out of building work otherwise than in accordance with a building consent. The Judge subsequently imposed fines on the appellants in a sentencing decision delivered on 28 April 2021.[2]

[2] The first appellant, Mr Cancian, appeals against both conviction and sentence. The second and third appellants, Mr Cameron and The Engineer Ltd, appeal only against conviction. At the commencement of the hearing they abandoned their appeals against sentence, and they are accordingly dismissed.

Background

[3] The first appellant, Mr Cancian, was at all material times the director and a shareholder of a company called Bella Vista Homes Limited (Bella Vista). Bella Vista acquired land near Tauranga for the purpose of undertaking a subdivision known as The Lakes. It subdivided the land into sections and then sold land and building packages in the subdivision to the public.

[4] Bella Vista engaged the second appellant, The Engineer Limited, to carry out engineering work in relation to the construction of dwellings on the land in the subdivision. That company is owned and operated by the third appellant, Mr Cameron.

[5] Bella Vista obtained building consents from the Council and then began constructing dwellings on sections within the subdivision. As construction work progressed, the Council and Worksafe New Zealand (Worksafe) became concerned regarding the quality of the work that was being carried out. Worksafe intervened out of concern for the safety of Bella Vista's employees, and the Council declared some

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1 *Tauranga City Council v Cancian* [2020] NZDC 25470.
2 *Tauranga City Council v Cancian* [2021] NZDC 7606.

of the dwellings to be dangerous. These decisions led to the cessation of construction work in the subdivision. Some of the buildings were eventually removed.

[6] As the Judge emphasised in his liability decision, the enquiry in the District Court did not relate to why the subdivision failed.[3] Rather, it related to whether the Council could prove the allegations in the charges beyond reasonable doubt.

The charges

[7] The Council laid charges against the appellants in relation to eight properties in the subdivision. These were:

(a) 297 Lakes Boulevard

(b) 297A Lakes Boulevard

(c) 299 Lakes Boulevard

(d) 301 Lakes Boulevard

(e) 301A Lakes Boulevard

(f) 303 Lakes Boulevard

(g) 307 Lakes Boulevard

(h) 5 Aneta Way

[8] The Council laid separate charges against the defendants in relation to each property. However, each of the charges listed several particulars. Each particular comprised an allegation that the defendant in question had carried out building work that breached the terms of the building consent in a specified manner. The fact that the charges contained several discrete and often dissimilar allegations meant they were not representative charges in terms of s 20 of the Criminal Procedure Act 2011. No

3 *Tauranga City Council v Cancian*, above n 1, at [20].

objection was taken to this at the trial and it avoided the need for a multiplicity of charges to be laid. However, it meant the Judge needed to determine whether the prosecution had established any or all of the particulars listed in relation to each charge. As he observed in the liability decision, he was effectively required to reach a decision in relation to 93 charges.[4]

Appellate approach

[9] The appeals against conviction are brought under s 229 of the Criminal Procedure Act 2011 (the CPA). Section 232 of the CPA provides that the High Court may only allow an appeal against conviction if satisfied that the trial Judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred", or that "a miscarriage of justice has occurred for any reason". A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or that has resulted in an unfair trial.[5]

[10] Following *Sena v Police*, such appeals are to proceed by way of rehearing, and the appeal court is required to form its own view of the facts and determine the appeal accordingly.[6] If an appeal court comes to a different view from the trial Judge on the evidence, the trial Judge will next have erred and the appeal must be allowed. That said, the appeal is not to be approached *de novo*: it is for the appellant to show that an error has been made to such an extent that the process has miscarried.[7]

Part One: Mr Cancian's appeal against conviction

[11] Mr Cancian was convicted on charges that related to 297 Lakes Boulevard, 301 Lakes Boulevard and 5 Aneta Way. He was acquitted on charges relating to 297A Lakes Boulevard, 299 Lakes Boulevard, 301A Lakes Boulevard and 307 Lakes Boulevard.

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4 *Tauranga District Council v Cancian,* above n 1, at [8].
5 Criminal Procedure Act 2011, s 232(4).
6 *Sena v Police* [2019] NZSC 55.
7 At [38].

297 Lakes Boulevard

[12] The charge relating to 297 Lakes Boulevard contained six separate particulars. One of these related to the front wall, three related to the rear wall and two related to a rear wall known as the "store" wall.

[13] Four of the particulars related to alleged defects in the location and spacing of vertical reinforcing steel used in the walls. This was installed within the blockwork before concrete was poured into the central cavity of the blocks. The Judge considered these defects were caused by Mr Josephs, the blocklayer who built the wall, and Mr Cameron, who had signed it off in a producer statement as "ready to pour". He therefore did not accept the particulars relating to defects in the steel reinforcing had been established.

[14] The Judge also found the prosecution had failed to prove a particular alleging that the height of the rear wall was 2.8 metres, whereas the maximum allowable height under the building consent was one metre.

[15] The only particular on which the Judge found Mr Cancian guilty alleged that the footing of the rear wall was inadequately sized to resist soil loads. The building consent had been issued on the basis of the plans and specifications Bella Vista had supplied with its application. These showed the rear wall as being one metre in height. This meant the New Zealand Building Standard known as NZS3604 applied. This prescribed footings of at least 300mm x 300mm but did not require design input from an engineer. As matters transpired, however, the extent to which the site around the wall was excavated meant that a wall 2.8 metres in height was ultimately built. This was 1.8 metres in excess of the height shown in the plans and specifications. This meant the wall was constructed in breach of the building consent, and the height of the wall was such that its design required input from an engineer.

[16] The Council's structural engineer, Mr Jacobsen, gave evidence that he measured the footings under the wall in September 2018 and found that they were 240 mm deep x 290 mm wide. This meant they did not comply with the measurements contained in the consented specifications. Furthermore, he considered a wall that was 2.8 metres in height would create loads and stresses requiring cantilevered footings at

least 1.3 metres (1300mm) in width. The footing that had been installed was therefore inadequately sized to resist soil loads.

[17] The Judge's reasoning in relation to this particular is as follows:[8]

> [267] Mr Cancian supervised work on this site and filed a ROW [record of work] in relation to the floor and footing.
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> [268] At the time he issued his ROW in relation to the footing it would have been obvious to him that the wall to be built on the footing would extend beyond the consented 1m height. As LBP [licensed building practitioner] authorised to certify footings he assumed the responsibility to ensure code compliance. The footing certified by him was not code compliant for reason that the consented wall was now impossible to build.
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> [269] He is caught by the *Kwak* principle under the particular relating to the inadequately sized footing but is not liable under the other two particulars.

[18] Mr Nabney raises several grounds of appeal on Mr Cancian's behalf. These relate to the wording used in the ROW and the fact that another witness, Mr Gibson, accepted in evidence that he had supervised the construction of the footings on the rear wall. Mr Gibson had also filed a record of work in relation to this work. In order to understand these arguments it is necessary to describe some of the relevant background.

[19] One of the issues that arose during the trial was whether Mr Cancian was the Licensed Building Practitioner (LBP) responsible for the building work that led to the charges. The 2004 Act creates a regime relating to restricted building work that is critical to the structural integrity of a building.[9] Such work can only be carried out or supervised by persons who are LBP's.[10] The 2004 Act also contains a disciplinary regime that imposes liability on LBP's for inadequate supervision of restricted building works.[11] Furthermore, an LBP who carries out or supervises restricted building work is required to complete a record of that work in the prescribed form setting out the work that has been carried out or supervised.[12] The record is to be

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8 *Tauranga City Council v Cancian*, above n 1.
9 Building Act 2004, Subpart 4 of Part 2.
10 Section 84.
11 Section 85.
12 Section 88(1).

provided to the owner of the property on which the work has been carried out and the territorial authority for the district in which the restricted building work is situated.[13]

[20] The LBP regime is designed to promote the purposes of the 2004 Act. These are contained in s 3:

> **3 Purposes**
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> This Act has the following purposes:
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> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
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> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
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> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
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> (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[21] The Council advanced its case against Mr Cancian on the basis that he could be found guilty of the charges using several different pathways. One of these was that Mr Cancian had supervised work carried out on this and other sites in his capacity as an LBP for carpentry work. This included the installation of the foundations and footings, both of which are forms of restricted building work under the 2004 Act.

[22] In *Tan v Auckland Council*, Brewer J confirmed that a person who supervises and instructs those who physically carry out building work may be liable for breaches of s 40 in the same way as those who physically undertake that work.[14] There was no challenge to the correctness of this proposition in the present appeal.

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13 Section 88(2).

14 *Tan v Auckland Council* [2015] NZHC 3299 at [73].

[23] Mr Cancian accepted he had carried out the function of an LBP carpentry in relation to some of the properties for which charges had been laid. He disputed he had done so in relation to others. He also disputed the proposition that he had been responsible for supervising the building work carried out by others. The Judge found Mr Cancian not to be a reliable witness generally and preferred the evidence of other witnesses to that given by him.[15] He found that Mr Cancian held himself out as the LBP carpentry on all sites and that he performed that function.[16] Mr Cancian does not challenge this factual finding on appeal.

[24] The Judge also noted, however, that Mr Cancian's assumption of responsibility as LBP carpentry on all sites did not mean he had supervised the work carried out on every site.[17] In most cases project managers stood between Mr Cancian and those who physically carried out the work. Those persons provided the control, direction and oversight required of a supervisor.

[25] This was not the case with 297 Lakes Boulevard because, as the Judge observed, Mr Cancian accepted he was the project manager for building work carried out at that address.[18] He was therefore responsible for the direction, control and oversight required of a supervisor. Given this undisputed finding of fact I consider the Judge was correct to conclude Mr Cancian's role as project manager rendered him liable for the breach of the particular the Judge found proved in relation to 297 Lakes Boulevard.

[26] Using the same reasoning I am surprised the Judge did not also find the particular relating to the installation of the 2.8 metre high wall established. The Judge found that Mr Cancian was directly involved in excavation decisions relating to the heights and siting of houses to be built in the subdivision. This impacted directly on the rear walls of 297 and 301 Lakes Boulevard, which could not be constructed as consented and required significant variation in both height and footing size. Mr Cancian must have been aware of that fact. The Judge did not, however, consider Mr Cancian's involvement in excavation decisions rendered him liable for the

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15 *Tauranga City Council v Cancian* above n 1, at [35] and [80]-[87].
16 At [109].
17 At [109] and [118].
18 At [117].

downstream consequences for the rear wall. He considered it was "drawing too long a bow" to reason that a involvement in excavation decisions "necessarily involves knowledge that at a future date [such decisions] will result in non-compliance in relation to a single wall and the footings upon which it is to be constructed".[19]

[27] I find it difficult to follow this logic given the fact that Mr Cancian was project manager for the work carried out at 297 Lakes Boulevard. If, as the Judge subsequently found, he must have known the footings were too small, he must also have known the wall was too high. One went hand in hand with the other. Mr Cancian can therefore consider himself fortunate the Judge did not find the particular relating to the height of the wall established.

[28] The particular relating to 297 Lakes Boulevard that the Judge did find established also rested upon a ROW filed by Mr Cancian stating that he had supervised various types of restricted building work undertaken at that address.[20] The ROW included a category of work described as "Foundations and subfloor framing". Foundations would ordinarily include footings such as those constructed under the rear wall. In the present case, however, the space in the form headed "Description of restricted work" stated "Ribraft foundations as per plan and manufacturers specifications". It is common ground that ribraft foundations relate to the main concrete floor slab. Mr Cancian therefore says the ROW he provided for this address did not relate to the supervision of the installation of the rear wall footings, but rather confirmed that he had supervised the installation of the ribraft foundations.

[29] On the Council's behalf Mr Marchant refers me to a ROW Mr Cancian completed for another property in the subdivision. Mr Cancian accepted he had supervised the installation of wall footings in this property. Notwithstanding this fact he completed the ROW in exactly the same way as he completed the ROW for 297 Lakes Boulevard. The description of the work done under the heading "Foundations and subfloor framing" was again stated to be "Ribraft foundations as per plans and specifications". Mr Marchant submits that this shows that when Mr Cancian completes an ROW for this type of work he routinely describes the work he has

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[19] At [125].
[20] At [269].

supervised as being "ribraft foundations" even when he has also supervised the installation of footings.

[30] This may be so. On its face, however, the ROW related only to the main floor slab. It did not state that Mr Cancian had supervised work undertaken on the wall footings. As a result, the Council was not entitled to assume that it extended to wall footings.

[31] Matters are also complicated by the fact that Mr Robert Gibson, another LBP, acknowledged he had been responsible for supervising the installation of the footings at 297 Lakes Boulevard. He also filed an ROW in relation to that work. Mr Gibson was not challenged on this point and the Judge made no reference to it. It is of course possible for two persons to supervise and be responsible for the same work even though it is not possible for one LBP to supervise another. In the present case, however, Mr Gibson's role in events further diminishes the Council's ability to rely on the fact that Mr Cancian filed an ROW relating to foundation work at 297 Lakes Boulevard.

[32] The Judge also reasoned that in filing the ROW Mr Cancian was liable by virtue of the so-called *Kwak* principles.[21] I refer to these in greater detail later in the judgment.[22] In short, however, they relate to acts that may constitute "building work" and therefore be relevant to whether a civil claim has been filed within the required time. This flows from the fact that s 393 of the 2004 Act precludes claims based on building defects being brought more than ten years after a building has been built. In *Kwak* this Court held that, in determining whether a civil claim has been filed out of time, the issuing of a producer statement constitutes "building work" in terms of s 393. A claim will therefore not be deemed to have been filed out of time under s 393 of the 2004 Act if a producer statement has been issued within ten years prior to the commencement of the claim.

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21 At [269].
22 At [61]-[79].

[33] By analogy the Judge found the filing of an ROW by an LBP also constituted building work for the purposes of a prosecution under s 40 of the 2004 Act.[23] However, I do not consider the filing of an ROW can be regarded as analogous to the issuing of a producer statement. As I observe later,[24] the latter is a document that may assist a building consent authority determine whether grounds exist to issue a building consent or code compliance certificate. However, the 2004 Act does not refer to producer statements and imposes no requirements in relation to them. That is not the case with an ROW. Sections 88(1) and (2) of the 2004 Act require an LBP to provide an ROW to the owner of the property on which restricted work is undertaken and the territorial authority for the district in which the building work is located.

[34] The filing of an ROW may obviously be evidence of the fact that the LBP who files it carried out or supervised the work referred to in the ROW. However, I do not consider it provides conclusive evidence of that fact. Furthermore, it is a record of restricted building work that has been carried out rather than building work in its own right. In addition, s 88(4)(a) of the 2004 Act provides that an ROW "does not, of itself, create any liability in relation to any matter to which the ROW relates." Later in this judgment I conclude that the so-called *Kwak* principles do not apply in the present context.[25] For the reasons I have given I do not consider the fact that Mr Cancian filed an ROW in relation to 297 Lakes Boulevard assisted the prosecution's case.

[35] It follows that the only basis on which Mr Cancian could be convicted on this particular is the fact that he was the overall project manager at 297 Lakes Boulevard. As I have already observed, I consider he was properly convicted on this particular.

[36] The appeal against conviction on this charge therefore fails. However, as indicated above, I consider Mr Cancian's liability rests on a slightly narrower basis than that determined by the Judge.

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23 At [96].
24 At [54].
25 At [75].

301 Lakes Boulevard

[37] The excavation work that was carried out around this site meant it was necessary to construct a rear wall that was 2.45 metres high rather than one metre as shown in the consented plans. The footings for the wall were found to be 300 mm x 300 mm as the plans and specifications required for a wall that was one metre in height. The footings therefore complied with the consented plans and specifications, but they were manifestly inadequate to support the wall that was ultimately built.

[38] Mr Cancian filed an ROW for the foundation works carried out in relation to this property. It was in the same terms as the ROW he filed for 297 Lakes Boulevard. It referred to the restricted building work undertaken as "Ribraft foundations as per plans and specifications". The Judge followed the same approach he took in relation to 297 Lakes Boulevard and held that Mr Cancian was liable for the defective footings because he had filed the ROW and was liable under the so-called *Kwak* principles.

[39] Once again, however, Mr Gibson gave evidence that he had supervised the installation of the footings for 301 Lakes Boulevard and he also filed an ROW in relation to that work. His firm invoiced Bella Vista for the work. For the reasons already given I do not consider the filing of the ROW was sufficient without more to render Mr Cancian liable under the charge relating to 301 Lakes Boulevard. Furthermore, Mr Cancian was not the project manager for construction work carried out on this property as he was for 297 Lakes Boulevard. It follows that the conviction and fine imposed under this charge must be quashed.

5 Aneta Way

[40] The charge relating to 5 Aneta Way related to cladding defects that were discovered after the project had come to a halt. There was no dispute Mr Cancian was the LBP carpentry for work on this site and as such he was responsible for ensuring that the cladding work complied with the consent. He supervised work carried out at the site by another builder, Mr Wesley Scott, and he also filed a ROW in his capacity as LBP carpentry.

[41] The principal ground of appeal in relation to this charge is that the Judge wrongly found that Mr Cancian had failed to follow the manufacturer's specifications when installing the cladding. This issue arises because the consented plans and specifications required the installation of any product to be carried out in accordance with the manufacturer's specifications. The cladding used at 5 Aneta Way was manufactured by a company called Claymark. At trial the prosecution produced a copy of the specifications produced by Claymark for the installation of its cladding. It then sought to establish that Mr Cancian had installed the cladding at 5 Aneta Way otherwise than in accordance with Claymark's specifications. By way of example, it sought to establish that the specifications were breached because timber weatherboards beneath boxed corners had been inappropriately configured and the cut ends of timber weatherboards had been affixed without being primed with an appropriate undercoat.

[42] Mr Cancian seeks leave to adduce fresh evidence in the form of an affidavit by Mr Cameron Hanson-Beadle. Mr Hanson-Beadle has undertaken searches on the internet to determine whether the Claymark specifications were in existence as at the date upon which the dwelling at 5 Aneta Way was constructed. He has concluded that the earliest iteration of the specifications is dated 23 January 2018. The dwelling at 5 Aneta Way was completed in March 2017. Mr Nabney therefore contends the Judge necessarily erred in concluding that Mr Cancian had installed the cladding otherwise than in accordance with the manufacturer's specifications.

[43] I grant the application for leave to adduce this evidence but do not consider it materially assists Mr Cancian on the appeal. Although the Judge referred to the Claymark specifications it is clear that he did not base his findings in relation to the particulars of this charge solely on any failure to follow the manufacturer's specifications. Using the examples referred to above, in finding the timber under the boxed corners to have been incorrectly configured, the Judge preferred the evidence of the witness called for the prosecution to that of the witness called for the defence. The witness for the Council had said that weatherboards were incorrectly configured at the boxed corners whereas the witness called for the defence disagreed. Similarly, the Judge considered the requirement to ensure that any cut timber was primed with undercoat arose from the consent, which expressly required the builder to ensure that

"all cut edges and ends are fully primed prior to fixing". I therefore do not consider the Judge placed any significant reliance on the alleged breaches of the manufacturer's specifications.

[44] It is also to be noted that Mr Cancian defended the charge to the extent that it related to failing to prime timber largely on the basis that he had entrusted his apprentice, Mr Scott, to attend to these issues. He said he had given Mr Scott a wood preservative called Metalex to use in place of primer because he considered it to be superior to primer. The evidence for the Council was to opposite effect and Mr Scott had no recollection of using Metalex in place of primer. The Judge did not accept that Metalex was used or that it could meet the consent requirements as to priming. He considered the Metalex evidence to be contrary to the evidence and implausible in any event. The manner in which Mr Cancian defended this aspect of the charge demonstrates, however, that he knew that the cladding needed to be primed prior to installation.

[45] The remaining particular under this charge related to the alleged use of incorrect nails to fix boxed timber corners. The evidence showed that lightweight panel pins had been used and these had begun to rust. Mr Cancian said he had supplied galvanised jolt head nails to the site and expected Mr Scott to use these. The consent required nails of this type to be used. However, Mr Scott said it had been his practice to use the lighter nails in boxed corners and did not appear to know of the specification requiring the more substantial galvanised nails to be used. As LBP on the site it was ultimately Mr Cancian's responsibility to ensure the correct type of nails were used. The Judge was plainly correct to find this particular proved.

[46] It follows that the Judge was correct to have found the particulars relating to 5 Aneta Way proved beyond reasonable doubt.

Result

[47] Mr Cancian's appeal against conviction has succeeded in relation to the charge laid in respect of the dwelling built at 301 Lakes Boulevard but failed in relation to the remaining two charges.

[48] It will now be necessary for both parties to make submissions as to whether the fine imposed on the charge relating to 297 Lakes Boulevard should be reduced to reflect the more limited basis on which I have found that charge was proved. I will defer delivering my decision in relation to the appeal against sentence in relation to 5 Aneta Way until I have heard submissions in relation to the charge relating to 297 Lakes Boulevard.

Part Two: The appeal against conviction by Mr Cameron and The Engineer Ltd

[49] Mr Cameron and The Engineer Ltd were convicted on charges relating to 297, 301, 303 and 307 Lakes Boulevard. As in the case of the charges relating to Mr Cancian, each of the charges related to a single address and contained several discrete particulars. The Council advanced its case against Mr Cameron and The Engineer on the basis that they had provided the Council with producer statements relating to restricted building work allegedly carried out at the nominated sites and these did not conform with the reality of what had been done.

Preliminary issues

[50] The principal issue these appeals raise is whether the act of providing a producer statement can give rise to a charge laid under s 40. Before dealing with that issue I propose to deal briefly with two issues that arose after the Council filed and served its submissions in response to the present appeal. The first arises because the Council's written submissions suggested that Mr Cameron and his company could have been convicted under the so-called *Tan* principles. The Council suggested Mr Cameron was rightly convicted because he supervised much of the work undertaken at several of the building sites.

[51] This was not, however, the basis on which the Council conducted its case at trial. When the Council opened its case the prosecutor advised the Judge that the charges against Mr Cameron and The Engineer were based on the fact that they had filed producer statements (referred to as PS4's) confirming that work had been carried out in accordance with the consent when this was not the case.

[52] During oral submissions before me Mr Marchant said that when the Council laid the charges, the only evidence it could rely upon against Mr Cameron and The Engineer were the producer statements they had filed with the Council. Mr Marchant contended that matters changed as the trial progressed and the nature of Mr Cameron's culpability became clear. He therefore submitted that by the end of the trial the Council was entitled to adopt a broader approach to culpability than it had adopted at the beginning.

[53] This submission may have had merit if the Council had closed its case in this way. The written submissions the Council presented to the District Court make it clear, however, that the Council closed its case on the same basis as it had opened it. It relied solely on the fact that Mr Cameron and The Engineer had provided the Council with producer statements falsely depicting the work that had been carried out at the nominated sites. I do not consider it is now open to the Council to attempt to justify the convictions on a different basis to that alleged at trial.

[54] The second issue arises because the Council suggested that physical tests Mr Cameron carried out when he inspected the sites amounted to building work in terms of s 40. This argument must also fail because the Council never relied upon it at trial.

Producer statements

[55] Producer statements are statements issued by professionals in the construction industry such as chartered professional engineers. They are designed to provide reasonable assurance to a building consent authority that a design or construction complies with the New Zealand building code. They are one source of information available to the building consent authority in deciding whether there are reasonable grounds to issue a building consent or code compliance certificate. It avoids the need for the authority to undertake design or construction checking that has already been undertaken by others who are appropriately qualified for the task.

[56] Producer statements have no legal status under the 2004 Act. That was not the case with its predecessor, the Building Act 1991 (the 1991 Act). The 1991 Act referred to producer statements in several contexts and contained the following definition:

> Any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications:

[57] The practical role played by producer statements has been described in both *Kwak v Park*[26] and by Ellis J in the subsequent decision of *Andrew Melvin King-Turner Ltd v Tasman District Council,* to which I refer in greater detail shortly.[27] They were widely used under the 1991 Act after having been developed through the combined efforts of stakeholders in the building industry.

[58] The value of producer statements lies in the fact that, used appropriately, they avoid the need for building consent authorities to expend their resources in physically inspecting every item of building work. They have particular value in relation to building works such as foundations, masonry and structural aspects within buildings. These can be very technical parts of a construction project and many building consent authorities do not have the resourcing or in-house capability to inspect these aspects of the building.

[59] There have traditionally been four different types of producer statement. That used in the present case is known as PS4 Construction Review, which is intended for use by a suitably qualified design professional who undertakes construction monitoring of building works where a building consent authority (in this case the Council) requests a producer statement before issuing a code compliance certificate.

[60] The widespread use of producer statements under the 1991 Act led to problems. On occasions building consent authorities placed too much reliance on producer statements without sufficient scrutiny of the author's qualifications or their contents. This led to decisions being made that were not sufficiently robust.

[61] It appears, however, that the introduction of the 2004 Act has not significantly reduced the use of producer statements in the building industry. They remain widely used as a means of establishing compliance with the code and building consents. This no doubt reflects the level of construction work that is being undertaken and the

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26 *Kwak v Park* [2016] NZHC 530 at [40]-[43].
27 *Andrew Melvin King-Turner Ltd v Tasman District Council* [2021] NZHC 343 at [17]-[24].

limited ability of building consent authorities to undertake physical inspections using in-house staff.

Kwak v Park

[62] This case involved an appeal against a determination of the Weathertight Homes Tribunal. The claimants had brought a claim under the Weathertight Home Resolution Services Act 2006 (the WHRS Act) alleging negligence on the part of the former owner and builder of their home. The Tribunal dismissed the claim and one of the issues raised in the resulting appeal to this Court was whether the claim was precluded by the time bar imposed by s 14(a) of the WHRS Act. As I have already observed, this issue arose because s 14(a) of the WHRS Act restricted claims under that Act to houses built prior to 1 January 2012 and within the period of ten years immediately before the day on which the claim was brought.

[63] Woolford J noted that the Supreme Court had considered the meaning of the word "built" in *Osborne v Auckland Council.*[28] It held that the intention in s 14(a) of the WHRS Act was to align the eligibility criteria with s 393 of the 2004 Act. Parliament intended the term "built" under s 14(a) of the WHRS Act to be construed by reference to the expression "building work" in s 393 of the 2004 Act.[29]

[64] Section 393 of the 2004 Act provides:

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> 2) However, [no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought] against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

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28 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766.
29 At [27].

> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> > (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
> >
> > (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[65] In *Kwak,* the original owner-builder of the dwelling had obtained a code compliance certificate after providing producer statements certifying that he had properly completed aspects of the building work. Woolford J was required to determine whether this act constituted "building work" under s 393 so as to avoid the claim being precluded by the ten year time bar. He found in favour of that proposition for the following reasons:[30]

> [49] The essential question is therefore — was the completion of the producer statements by Mr Park "work for, or in connection with, the construction of a building"?
>
> [50] In my view, it was. First, the completion of producer statements is work, which can be defined as exertion or effort directed to produce or accomplish something. There is no logical reason why the ordinary meaning of work should not apply or the definition be restricted to physical work. Second, the work of completing a producer statement is in connection with the construction of a building, just as much as the physical work of applying a waterproof membrane.
>
> [51] I note that the earlier definition of building work in the Building Act 1991 did not specifically include design work. The fact that the definition of building work was expanded in the Building Act 2004 to specifically include design work does not mean, however, that the completion of producer statements does not fall within the definition. Design work in general has been held to be within the meaning of construct.
>
> [52] There is no reference to certification in s 14(a) of the WHRS Act, but as the Supreme Court commented in *Osborne:*
>
> > "The apparent omission in relation to certification is, however, remedied once it is realised that the word 'built' [in s 14(a)] must have been intended to be construed by reference to the expression 'building work' in s 393 of the Building Act, which does encompass certification."

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30 *Kwak v Park*, above n 26.

> [53] So we now have both design and certification falling within the statutory definition of building work. It would be anomalous if the definition of building work was interpreted to exclude the completion of producer statements, which, in my view, are just as much building work as design and certification.
>
> [54] Ms Roche had difficulty accepting that the producer statements signed by Mr Park fell within the definition of building work because they were indeed statements and related to acts such as the application of waterproofing membranes that were limitation barred having occurred more than ten years prior to the claim being brought. Although they are indeed statements, producer statements are properly viewed as an integral part of the building process. A building is unlikely to receive a code compliance certificate without them.

[66] In the present case the Judge relied upon the conclusion reached by Woolford J in *Kwak* as authority for the proposition that the provision of producer statements also constituted building work as that term is used in s 40 of the 2004 Act.

Andrew Melvin King-Turner Ltd v Tasman District Council

[67] The judgment in this case was issued on 2 March 2021, so it was not available when the present case was heard in the District Court. It involved an appeal against conviction by an engineer and his company on charges laid under s 40 of the 2004 Act. As in the present case, the appellants had provided a producer statement in relation to work carried out on the construction of a building. Unlike the present case, however, the work had been undertaken before a building consent had been issued. The producer statement was likewise provided before the consent had been issued. A building consent and code compliance certificate were both subsequently issued.

[68] The charges were laid after the building consent authority investigated the circumstances in which the appellants had provided the producer statement. At first instance the prosecution successfully relied on the reasoning contained in *Kwak* to establish that the provision of the producer statement amounted to the carrying out of "building work" for the purposes of a charge under s 40.

[69] Ellis J began her consideration of this issue by pointing out the manner in which the 2004 Act allocates responsibilities between different actors in the building industry.[31] These include:

(a) The responsibility of an owner to obtain and ensure compliance with, any necessary building consent (s 14B);

(b) The responsibility of a designer to ensure relevant plans and specifications or the relevant advice are sufficient to result in the building work complying with the building code if the building work were properly completed in accordance with those plans and specifications or that advice (s 14D);

(c) The responsibility of a builder (defined as "any person who carries out building work") to ensure the building work complies with the building consent and the plans and specifications to which the building consent relates, and to ensure that building work not covered by a building consent complies with the building code (s 14E(2));

(d) The responsibility of an LBP who carries out restricted building work to ensure that the work is carried out or supervised in accordance with the requirements of the 2004 Act and that he or she is licensed in a class authorised to carry out or supervise that work (s 14E(3));

(e) The responsibility of a building consent authority to check to ensure that an application for building consent complies with the building code, to ensure that building work has been carried out in accordance with the building consent for that work and to issue building consents and certificates in accordance with the requirements of the Act (s 14F).

[70] Ellis J then observed that as chartered professional engineers the appellants met the definitions both of "designer" and LBP.[32] They were therefore subject to

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31 *Andrew Melvin King-Turner Ltd v Tasman District Council*, above n 27, at [25].
32 At [28].

obligations under s 14D (which does not include ensuring a building consent is obtained or complied with) and s 14E(3). Section 14E(3) includes an obligation to ensure that restricted building work is undertaken in accordance with the Act and therefore (at least arguably) in accordance with any requirement that a building consent be first obtained. As a matter of logic, Ellis J found it difficult to see how they could also fall within the definition of "builder" under s 14E(1) so as to be subject to an obligation under s 14E(2) to ensure compliance with any building consent.[33]

[71] The Judge then went on to conclude that the issuing of an incorrect producer statement does not constitute an offence under s 40 of the 2004 Act for the following reasons:

> [41] The present appeal does not, of course, concern the meaning of s 14 of the WHRS Act, but rather a criminal charge laid under s 40 of the BA04 [the 2004 Act]. The key s 40 question is not simply whether, in issuing the producer statement, the appellants were "carrying out building work", but whether they were carrying out such work *other* than in accordance with a building consent.
>
> [42] It seems tolerably clear that the purpose of s 40 is to prohibit the undertaking of building work without, or contrary to, a building consent. But as a matter of simple logic, the focus of the section can only be on work that is capable of, and requires, authorisation by a building consent. Given that producer statements have no formal status under, and are not referred to in or required by, the BA04, it is difficult to see how issuing one (or any other similar statement) could constitute work of that kind. Even under the BA91 [the 1991 Act] —which did expressly recognise producer statements—it seems plain that issuing such a statement was not *itself* an action that required a building consent.
>
> [43] My view that issuing a producer statement is not building work under s 40 is fortified by the statutory division of roles and responsibilities referred to earlier. As noted there, it is owners and builders who are required to comply with building consents. And while I have accepted it is arguable that the appellants might have a responsibility to ensure that *restricted* building work is carried out or supervised in accordance with the requirements of the Act (and, so, a building consent), there has been no suggestion that the work that was the subject of the PS4 here was work of that kind. Even if it was, it would not be the act of issuing of the PS4 that would constitute the breach; it would be the failure to ensure that the work was done or supervised in the required way.
>
> [44] I accept that BCAs (building consent authorities) and the building industry more widely may regard PS4s as a convenient means by which engineers convey their "advice" as to the compliance of the relevant building works with a building consent, and that BCAs may often rely on that advice.

33 At [29].

> And I agree that it makes no sense for such advice to be given when there is no building consent in existence. But giving nonsensical or negligent advice does not engage s 40; any breach of that provision lies elsewhere, and with others.
>
> [45] I agree with the view expressed by Ms Campbell in the article referred to at above. An engineer who certifies or confirms that building work complies with a building consent when—for whatever reason—it does not is at risk of disciplinary proceedings, liability in tort (for misstatement), or prosecution under s 369 of the BA04 for making a false or misleading statement.
>
> (footnotes omitted)

Analysis

[72] Several of the factors identified by Ellis J in *King-Turner* plainly count against the proposition that the provision of an incorrect producer statement may be sufficient to render the issuer liable under s 40. The first of these relates to the manner in which the 2004 Act allocates responsibilities. The fact that producer statements have no official status under the 2004 Act no doubt explains why issuers of such statements are not identified in the 2004 Act as being responsible for ensuring that any of the requirements of the Act are complied with. Importantly, the builder and building consent authority are the only entities identified as being responsible for ensuring the terms of a building consent have been complied with.

[73] The 2004 Act obviously does not prevent building consent authorities from taking into account the information contained in producer statements when deciding whether to issue a building consent or code compliance certificate. In doing so, however, they may not abdicate their statutory responsibilities under s 14F. Before giving weight to such information they must be satisfied both as to the qualifications and integrity of the issuer of the statement and the nature and scope of the information contained in the statement. If questions arise as to either of these matters it is the responsibility of the building consent authority to make such further enquiries as may be necessary to ensure reasonable grounds exist to issue the certificate that is being sought.

[74] Secondly, the issue to be determined under s 40 is fundamentally different to that determined in *Kwak.* The issue to be determined in *Kwak* was whether the house in question had been "built" within the period of ten years before the claim was filed.

As I have already observed, the Supreme Court's determination in *Osborne* required that question to be answered by aligning the eligibility criteria under the WHRS Act with the limitation provisions contained in s 393 of the 2004 Act. Once that process was undertaken it became possible to ascertain whether the claim had been filed within ten years of the house being built. That was the end of the enquiry in *Kwak.*

[75] That is not the case in a charge laid under s 40. The enquiry does not end even if the provision of a producer statement can be said to amount to "building work" in its own right under the definitions contained in ss 7 and 393(1)(a) of the 2004 Act. In order to establish a charge under s 40 it is necessary to go on to determine whether that work was carried out otherwise than in accordance with the building consent. This question must be answered in the negative in the present case because the building consent did not refer to producer statements. The consent therefore provided no standards or requirements for information to be provided in any producer statement. Nor did it impose standards in relation to any inspections that precede the issuing of a producer statement. This meant it was not possible for Mr Cameron and The Engineer to issue a producer statement that breached the building consent.

[76] Thirdly, a producer statement issued in support of an application for a code compliance certificate will necessarily relate to building work that has already been undertaken. Generally speaking, however, criminal liability is only imposed on the person who actually commits the offence (the principal) and those who arrange for the offence to be committed or who encourage and/or assist in the commission of the offence (the party).[34] Liability as a party in the latter case will generally only arise for acts committed prior to the point at which the offence has been completed. Thereafter the only way in which liability can be imposed is through the principles relating to liability as an accessory after the fact.

[77] There may be cases in which a person encourages or assists the commission of an offence under s 40 by agreeing in advance to provide producer statements that do not reflect the reality of the building work that has been undertaken. In the present case, however, Mr Marchant acknowledged there was no basis on which the Council

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[34] Crimes Act 1961, s 66(1).

could realistically contend Mr Cameron was a party to the commission of the offence by those who carried out the non-compliant work at The Lakes subdivision.

[78] These arguments do not dispose of the issue entirely because the building work that was carried out in *King-Turner* was not restricted building work. Ellis J expressly left open the possibility that the issuer of a producer statement for restricted building work "might have a responsibility to ensure such work was carried or supervised in accordance with the Act (and, so, a building consent)".[35]

[79] Reading the judgment as a whole, however, I am satisfied Ellis J was restricting this reservation to situations in which no building consent has been issued. This flows from the fact that the Judge had earlier, when discussing the appellants' role as engineers, referred to the fact that they were subject to the obligations imposed by s 14E(3).[36] This imposed an obligation to ensure restricted building work was undertaken in accordance with the Act "and, so (at least arguably) in accordance with any requirement in the Act that a building consent be first obtained".[37] In the present case this issue does not arise because a building consent had been issued.

[80] It follows that, like Ellis J, I consider the issuing of producer statements in relation to non-compliant building work does not give rise to liability under s 40 of the 2004 Act. This is sufficient to dispose of the appeals by both Mr Cameron and The Engineer.

[81] Before concluding, however, I endorse the observations made by Ellis J in the final paragraph of the passage set out above.[38] These relate to the consequences that may follow for a person who includes false or misleading information in a producer statement. To those suggested by Her Honour I would add another. This flows from the fact that professional advisers such as engineers enjoy the trust of building consent authorities because of both their qualifications and reputation. Building consent authorities need to be able to rely upon the issuers of producer statements to provide reliable and accurate information. Where such reliance is found to have been

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[35] *Andrew Melvin King-Turner Ltd v Tasman District Council,* above n 27, at [43].
[36] At [28].
[37] At [28].
[38] At [71].

misplaced, consequences will inevitably follow. These may include the authority declining to accept producer statements from the issuer in the future. Alternatively, the authority may require a great deal more information to be provided than would otherwise have been the case.

[82] This is particularly likely to be so for a professional who provides producer statements in relation to restricted building work. Such work underpins structural integrity and it is vital that building consent authorities have confidence in the veracity and reliability of information contained in producer statements that relate to it. The fact that transgressors may escape prosecution under s 40 is therefore likely to be of very little overall comfort to them in the longer term.

Result

[83] The appeals against conviction by both Mr Cameron and The Engineer are allowed and the convictions and fines imposed in the District Court are quashed.

Next event

[84] I will hold a telephone conference with counsel for Mr Cancian and counsel for the Council on Friday 1 April 2022 at 9.15 am to make directions in relation to the sentence appeal by Mr Cancian.

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Lang J