IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA280/2022
[2023] NZCA 257

BETWEEN	DANNY JOHN CANCIAN Applicant
AND	TAURANGA CITY COUNCIL Respondent

Court:	Clifford, Wylie and Whata JJ
Counsel:	W T Nabney for Applicant R J A Marchant and S C M Waalkens for Respondent
Judgment: (On the papers)	26 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The extension of time is granted.

B The application to adduce fresh evidence is declined.

C The application for leave to bring a second appeal is declined.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The applicant, Mr Danny John Cancian, was convicted by Judge Mabey KC following a Judge alone trial in the District Court at Tauranga on three charges brought by the Tauranga City Council (the Council) under s 40 of the Building Act 2004

(the Act) of carrying out building work otherwise than in accordance with a building consent.[1]

[2] Mr Cancian appealed to the High Court. Lang J allowed Mr Cancian's conviction appeal against one of the charges but upheld the remaining two.[2]

[3] Mr Cancian now seeks leave to bring a second appeal against conviction. He requires an extension of time. He also seeks leave to adduce further evidence.

[4] In a minute dated 27 July 2022 Brown J directed that the issue of leave should be determined separately from the proposed substantive appeal and that the leave application should be decided on the papers.

Extension of time

[5] Mr Cancian's application is seven working days out of time. The respondent opposes the application. The delay is short. It has been explained as an oversight by counsel. An extension of time is granted.

Leave criteria

[6] Pursuant to ss 237 and 253 of the Criminal Procedure Act 2011, this Court may not grant leave to a second appeal against conviction or sentence unless it satisfied that:

(a) the appeal involves a matter of general or public importance; or

(b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[7] An appeal is unlikely to give rise to an issue of general or public importance unless it raises an issue of general principle or of general importance in the administration of the criminal law, including one that has broad application beyond

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1 *Tauranga City Council v Cancian* [2020] NZDC 25470 [District Court conviction judgment].
2 *Cancian v Tauranga City Council* [2022] NZHC 556 [High Court conviction judgment].

the circumstances of the particular case.[3] A miscarriage of justice will arise where there has been an "error, irregularity or occurrence in or in relation to the appeal that has created a real risk that the outcome of the appeal was affected."[4]

Background

[8] Mr Cancian was the director and shareholder of a company called Bella Vista Homes Ltd (Bella Vista). Bella Vista acquired land near Tauranga to subdivide and build houses. As construction progressed it became known to WorkSafe New Zealand (WorkSafe) and the Council that there were issues with the quality of construction undertaken. WorkSafe intervened out of concern for the safety of Bella Vista's employees and, as a result, the Council declared some of the houses under construction to be dangerous. Construction ceased.

[9] The Council subsequently laid charges under s 40 of the Act, relating to building work on eight properties, against not only Mr Cancian, but also his company Bella Vista, and against a Bruce John Cameron and his company, The Engineer Ltd. Both Mr Cancian and Mr Cameron were licensed building practitioners (LBPs) who supervised and undertook work during the subdivision and construction process and issued records of work (ROWs) from time to time. One charge was laid against each defendant in respect of each property. Each charge was then particularised by reference to the large number of ways non-compliant building work was said to have occurred. As Judge Mabey noted in his decision, this meant he was effectively required to reach a decision in relation to 93 charges.[5]

[10] After a six week Judge alone trial in the District Court at Tauranga, Mr Cancian was convicted by Judge Mabey on one particular charge in respect of three of those properties[6] — 297 and 301 Lakes Boulevard and 5 Aneta Way — and fined a total of $60,000.[7] The Judge's reserved decision runs to 510 paragraphs and is — as is so often necessary in this area — intensely factual. The detail in the judgment reflects the structure of the charges.

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3 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [36].
4 *Jackson v New Zealand Police* [2017] NZCA 374 at [29].
5 District Court conviction judgment, above n 1, at [8].
6 District Court conviction judgment, above n 1.
7 *Tauranga City Council v Cancian* [2021] NZDC 7606 [District Court sentencing judgment].

[11] Mr Cancian appealed his convictions as of right to the High Court. In a careful and detailed 84 paragraph decision Lang J allowed Mr Cancian's appeal with respect to one of those properties, but dismissed it as regard the other two.[8] The Judge did, however, uphold one of the remaining two convictions on a narrower basis than had been the case in the District Court.[9] The High Court subsequently reduced the fines imposed on Mr Cancian on those two convictions from $40,000 to $36,000.[10]

[12] We deal first with the application to adduce further evidence, and then the two applications for leave to appeal.

The evidence application

[13] Mr Cancian seeks to introduce Council documents which he says, are germane to the issue of whether the prosecution brought by the Council was within or without applicable limitation periods.

[14] He says the contents of the documents are relevant to the issue of limitation — namely when the Council became aware of defective work. One of the documents, a "PR report" refers to quotes made by a Council officer, Ms McLaughlin, noting defects in the cladding, and suggesting that there was non-compliance with relevant legal requirements. Limitation issues were raised in the District Court.[11]

[15] Mr Cancian submits that, had this document been disclosed, the relevant Council officer would have been further cross-examined in relation to her degree of knowledge.

[16] The test for the admission of new evidence was set out by the Privy Council in *Lundy v R*:[12]

> [120] The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the

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8 High Court conviction judgment, above n 2.
9 At [36].
10 *Cancian v Tauranga City Council* [2022] NZHC 862 [High Court sentencing judgment].
11 District Court conviction judgment, above n 1, at [461]–[508].
12 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273. See also *Ellis v R* [2021] NZSC 77 at [29]–[34].

> question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[17] We are satisfied this evidence does not meet the criteria for the admission of further evidence on appeal. The existence of this evidence at trial would not have reasonably altered the outcome of the trial, giving rise to a real risk of a miscarriage of justice.[13] There are a number of reasons pertinent to this conclusion. First, the quotations in the reports from the Council officer, identified by Mr Cancian as indicating earlier knowledge of the cladding defects, were taken from building compliance reports which were disclosed, and so the relevant information was known to the defence at trial. Second, the Council officer was, in fact, cross-examined in relation to her degree of knowledge. The officer explained she would have had insufficient information to form any view of the charge without destructive testing. Any knowledge she had before destructive testing was a mere suspicion as to cladding defects, and not enough in which to establish the particulars necessary in which to bring a charge. The Judge accepted this evidence his findings:[14]

> [501] [Ms McLaughlin] said that was the extent of the cladding defects she observed and that she would not be able to tell if there were any further defects without destructive testing. That destructive testing was unable to be carried out because the properties were still owned by the people who had entered into contacts with BVHL.
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> [502] The destructive testing which gave rise to the particulars in the charge for 5 Aneta Way did not occur until June 2019, well within the resulting limitation period.
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> [503] Mr Nabney submits that in relation to this charge the Council has done what was referred to in *Auckland Regional Council* and has sat back and waited for evidence to eventuate.
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> [504] However I am not satisfied that the Council, either directly or through the agency of Ms McLaughlin, sat on its hands. On the contrary the Council was actively pursuing the investigation and in my view did so with diligence.

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13 *Antolik v R* [2017] NZCA 576 at [37]–[38] citing *Lundy v R,* above n 12, at [150].

14 District Court conviction judgment, above n 1.

> [505] The testing carried out by Ms McLaughlin, and which gave rise to the particulars in the charge was within the limitation period.
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> [506] Nor do I accept Mr Nabney's submission that the proper course would have been for the Council to bring a charge based on Ms McLaughlin's April 2018 report and then particularise it by subsequent amendment or variation. That would not be a proper approach to the exercise of prosecutorial discretion. To do that would be to proceed on the basis of suspicion which is exactly [what] the authorities say should not occur.

[18] Given the above, we are satisfied that defence counsel had ample opportunity, which was taken, to cross-examine Ms McLaughlan on this issue. The existence of this report does not alter this factual finding by the trial Judge that the destructive testing was a necessary condition for the finding of knowledge by Ms McLaughlan as to the charged particulars at the 5 Aneta Way address.

[19] It should be further noted that the evidence does not relate to any of the grounds of appeal filed with this Court, or indeed the High Court. The grounds filed with this Court did not identify the limitation period as an issue on appeal. There has been no application to amend the grounds of appeal. As such, the evidence lacks cogency to the issues identified in the application for leave to appeal.

[20] For completeness, we note that the other two reports which Mr Cancian sought to adduce also do not meet the criteria for an application to adduce fresh evidence. It was not put to us how exactly these reports related materially to the issues subject to a proposed appeal. We are accordingly not satisfied that the relevant criteria is met.

297 Lakes Boulevard

[21] Mr Cancian's conviction on the charge relating to 297 Lakes Boulevard was based, the High Court found, on the undisputed and indeed accepted factual finding that Mr Cancian was the project manager for 297 Lakes Boulevard. Lang J reasoned:[15]

> [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. He found that Mr Cancian held himself out as the LBP carpentry on all sites

[15] High Court conviction judgment, above n 2, at [23]–[19] (footnotes omitted and emphasis added).

> and that he performed that function. Mr Cancian does not challenge this factual finding on appeal.
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> [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. 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.
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> [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. 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.*

[22] On a second appeal Mr Cancian wishes to argue in respect of his conviction relating to 297 Lakes Boulevard that it is not possible for him to be liable under s 40 of the Act for having supervised the non-compliant building work particularised in the charge because another LBP, a Mr Rob Gibson, carried out and/or supervised that same building work. Further, it is a matter of general or public importance that this Court considers, when work is carried out by a suitably qualified LBP who certifies that the work complies with the building consent (and therefore s 40 of the Act), whether a project manager can also be liable for the same non-compliant work.

[23] In the High Court, the argument (which Mr Cancian seeks to repeat here) was made that Mr Gibson's involvement precluded liability for Mr Cancian. Lang J was well aware of the involvement of Mr Gibson. The Judge commented:

> [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.

[24] There is, however, no legal basis to question the Judge's observation that two persons may supervise the same building work. The Act defines supervise in the following way:[16]

> **supervise**, in relation to building work, means provide control or direction and oversight of the building work to an extent that is sufficient to ensure that the building work—
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> (a) is performed competently; and
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> (b) complies with the building consent under which it is carried out.

[25] The term is of particular significance in subpt 4 of pt 2 of the Act, dealing with restricted building work. Restricted building work must be carried out or supervised by licensed building practitioners.[17] The Act does not support the contention there may be only one supervisor for particular restricted work. It is enough to refer to s 87(1) of the Act:

> (1) Before restricted building work commences under a building consent, the owner must give the building consent authority written notice of the name of every licensed building practitioner who—
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> (a) is engaged to carry out, or supervise, the restricted building work under the building consent; and
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> (b) was not stated in the application for the building consent under section 45(1)(e).

[26] The very clear implication is of a number of LBPs supervising restricted building work in any one building project. Where more than one LBP has undertaken supervisory work on a building project then, the question as to which one or more of them who should be looked to as regards responsibility for particular restricted building work, would appear to be essentially a question of fact. The issue arose in the District Court in that context, and was dealt with in that way as the passages we have cited above reflect. Mr Cancian's culpability arose as a result of his role as project manager of the site. Mr Gibson's involvement, as recognised by Lang J, did not affect that factual finding.

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16 Building Act 2004, s 7(1).
17 Building Act, s 84.

[27] We are satisfied that this ground of appeal does not meet the criteria for a grant of leave.

[28] Leave for a second appeal against the 297 Lakes Boulevard conviction is declined.

5 Aneta Way

[29] Mr Cancian seeks to bring a second appeal on the same evidential basis argued unsuccessfully in the High Court. He submits that that there has been a miscarriage of justice because the manufacturers specifications (the Claymark specifications) considered at trial did not exist at the time of the offending.

[30] There is nothing to suggest the decision of the High Court was in error or otherwise risked a miscarriage of justice. Lang J in the High Court was aware of and considered the significance of the fact that the Claymark specifications did not exist at the time of trial. He found that "[a]lthough 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."[18]

[31] This conclusion was plainly available to the High Court Judge. For example The District Court Judge found that particular (f) — that the incorrect nails were used — was established without any reference to the Claymark specifications, but instead on the basis of a breach of the New Zealand Building Code 1992, which was also incorporated into the resource consent.[19] The Judge also found the other particulars, (a)–(e), were established without sole reliance on the Claymark specifications.[20]

[32] Leave to appeal the 5 Aneta Way conviction is also declined.

Result

[33] The extension of time is granted.

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18 High Court conviction judgment, above n 2, at [43].
19 District Court conviction judgment, above n 1, at [454]–[458].
20 At [429]–[453].

[34] The application to adduce fresh evidence is declined.

[35] The application for leave to bring a second appeal is declined.

Solicitors:
Rice Spier, Tauranga for Respondent