IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA221/2022
[2023] NZCA 20

BETWEEN	ADRIAN NEIL PAGE First Applicant
AND	JULIE MAREE CROSBIE Second Applicant
AND	GREATER WELLINGTON REGIONAL COUNCIL Respondent

Court: Collins, Muir and Cull JJ

Counsel: S J Iorns for Applicants
R J B Fowler KC and A W M Britton for Respondent

Judgment: (On the papers) 15 February 2023 at 9.30 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The application for leave to bring a second appeal is granted.

REASONS OF THE COURT

(Given by Cull J)

[1] Mr Page and Ms Crosbie seek leave to bring a second appeal against a decision of the District Court, in which Judge Dwyer found the applicants guilty of 35 offences under the Resource Management Act 1991 (RMA).[1] Mr Page was sentenced to

[1] *Greater Wellington Regional Council v Page* [2021] NZDC 16019 (Verdicts judgment).

three months' imprisonment and Ms Crosbie was fined $118,742.[2] An enforcement order for the remediation of property was also made.[3]

[2] The applicants represented themselves both before Judge Dwyer in the District Court and before Gendall J on appeal in the High Court.[4] They seek leave to appeal on the grounds that there has been a miscarriage of justice on the issue of whether the presence of natural wetlands on Ms Crosbie's property (the Property) was proved beyond reasonable doubt.

[3] The applicants did not adduce expert evidence regarding the areas of natural wetland on the Property and now seek leave to adduce expert evidence. In support of the application to adduce further evidence, the applicants have filed two affidavits of a senior ecologist, Dr Vaughan Keesing and a senior hydrologist, Dr Jack McConchie. They both challenge the evidence of the Regional Council's expert Mr Spearpoint disputing that his evidence proves there are wetlands at the Property, which formed the basis of the 35 charges against each of them.

Background

[4] The background facts were helpfully and conveniently summarised by Gendall J in his first appeal judgment. We set them out as the relevant background to this application:

> [13] The Property was purchased by Ms Crosbie in May 2019 with the intention of it being restored back into farmland and developed as a beef farming unit with her partner, Mr Page. Subsequently, livestock was brought onto the Property and extensive development work was undertaken. It seems it was common ground between the parties that Mr Page undertook various works on the Property to advance the farming activity. These works included the construction of access tracks and stream crossings, wetland reclamation and the installation of water takes. The Council had alleged, and the District Court accepted, that the Property contained six wetlands as marked on a map of the Property prepared for the Council.
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> [14] The title to the Property is subject to a registered Easement Instrument 7943259.7. This provides for a right in gross to drain sewage, other waste material and fluids over parts of the Property (the disposal field) for the benefit of an adjacent rural-residential subdivision completed by Nikau Lakes

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2 *Greater Wellington Regional Council v Page* [2021] NZDC 23312 (Sentence judgment) at [34].
3 At [52][54].
4 *Page v Greater Wellington Regional Council* [2022] NZHC 762 (Appeal judgment).

> Biosystem Limited. A resource consent permitted Nikau Lakes Biosystem Limited to discharge up to 60,000 litres of treated human effluent and domestic wastewater onto the disposal field subject to certain conditions. Those conditions included a requirement that livestock were not permitted to graze in the disposal field.
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> [15] It appears also that part of the Property is traversed by a natural gas pipeline which is protected by the rights contained in Pipeline Certificate 90461 and an easement in gross, in favour of Natural Gas Corporation of New Zealand Ltd. That easement has been in place since 1987 and gas pipeline structures have been established on the Property for many years.
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> [16] Thirty-four of the offences faced by the Appellants were alleged to have taken place on the Property over a period commencing on 30 May 2019 and ending on 5 August 2020. The 35th charge related to an alleged contravention of an interim enforcement order obtained by the Council from the Environment Court on 22 December 2020 (the Interim Enforcement Order). The breach allegedly took place between 23 December 2020 and 2 March 2021.
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> [17] From the evidence before that Court, Judge Dwyer in the District Court accepted that, the offences arose out of observations made by the Council officers in the course of a number of inspections of the Property to assess compliance with RMA and/or possible contraventions of rules in the Council's proposed Natural Resources Plan (the PNRP). Those inspections took place between October 2019 and March 2021.

The District Court's decision

Verdict and reasons judgments

[5] As we have noted, the Council brought 35 charges against each of the applicants. These were grouped by Judge Dwyer into three categories:[5]

> (a) 25 "operational charges" against the RMA, which related to allowing cattle access to wetlands, disturbing wetlands, undertaking earthworks in water bodies, depositing substances into water or where they could enter it, taking water, and depositing soil onto a riverbed.
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> (b) Nine "abatement notice charges" which reflected the fact several operational offences were also breaches of abatement notices which had been served on the Appellants on 24 January 2020.
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> (c) One "enforcement order charge" which related to the failure of the Appellants to exclude livestock from the disposal field as required by the Interim Enforcement Order of the Environment Court.

[6] The Council led evidence from four witnesses. Of relevance to this application, the Council's expert, Mr Spearpoint, an expert in terrestrial ecology and

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5 Appeal judgment, above n 4, at [18].

wetland delineation produced a natural wetland investigation report, describing the delineation of the wetlands on the applicants' property, the impact of works undertaken on it and possible steps to remediation.

[7] In his verdicts judgment, Judge Dwyer acknowledged the expertise of Mr Spearpoint and "clearly preferred" his evidence in all respects, including the historical use of the property and Mr Spearpoint's conclusion that all six wetlands identified by the Council were "natural" wetlands for the purposes of the Council's Proposed Natural Resources Plan and, met the definition of "wetland" under s 2 of the Resource Management Act 1991.

Sentencing judgment

[8] In his sentencing judgment, Judge Dwyer emphasised the ecological importance of wetlands generally and specifically noted that in highlighting the importance of wetlands generally, he accepted that only a small area of wetlands was actually damaged. Against that, he considered the aggravating feature of the offending, particularly in relation to Mr Page, was the deliberate, prolonged and defiant nature of the offending and the number of charges involved.

[9] Ms Crosbie was fined a total of $118,742, together with solicitor and Court costs. On each of the abatement notice charges, Mr Page was sentenced to three months' imprisonment and, three months' imprisonment on the enforcement order offence, to be served concurrently.

Appeal to the High Court

[10] Although there were three grounds of appeal, only one is relevant to these applications. That ground asserts that the trial Judge erred by not accepting that all the wetlands on the property (excluding wetland 3C) were impacted or created by human activity and were excluded from the definition of "natural wetlands" in the proposed Natural Resources Plan (PNRP).

[11] The High Court rejected the applicants' appeal. Gendall J agreed with the District Court that a natural wetland may be created by artificial works that are

neglected or cannot be shown to be for one of the defined and excluded purposes in the PNRP and found that the applicants' focus on the genesis or lineage of various types of wetland was entirely misplaced and "missed the point" of how wetlands are delineated and defined.[6]

[12] The High Court accepted the factual findings of "the specialist environment division of the Court" and noted the absence of compelling expert evidence on appeal that identified an error.[7] In doing so, Gendall J commented on the evidence of Mr Spearpoint. He said this:

> [57] At the trial before Judge Dwyer, the primary evidence for the Council on this issue came from Mr Spearpoint. He is acknowledged as an expert in wetland ecology with considerable experience conducting over 70 stage one wetland delineation assessments in the Wellington Region. Mr Spearpoint produced a detailed report and provided extensive evidence on this matter. In addition, during the trial, he was cross-examined at length on his analysis, during the trial, by Mr Page.

[13] Gendall J also recorded Judge Dwyer's finding that "Mr Page has no expertise that was made known to the Court in the assessment of wetlands."[8] In rejecting this ground on appeal, Gendall J said:[9]

> [The trial Judge's] factual findings as to the presence of wetlands on the Property and their extent is generally in my view not to be questioned here in any real way, in the absence of compelling evidence, and particularly expert evidence which suggests an error has occurred. No such compelling evidence has been provided on this appeal, nor as I find it has Mr Page been able to qualify himself as an expert here.[10]

[14] Because the applicants were unable to show error in the trial Judge's "extensive and detailed verdicts judgment," he was satisfied no error or "real risk" of the outcome of the trial occurred or that the trial was in any way unfair. Nor was he persuaded that any miscarriage of justice had occurred.

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6 Appeal judgment, above n 4. at [99].
7 At [58].
8 Verdicts judgment, above n 1. at [78].
9 Appeal judgment, above n 4, at [58].
10 At [58].

Leave principles

[15] The application for leave to bring a second appeal is governed by s 253 of the Criminal Procedure Act 2011. Leave may be granted where the proposed appeal involves a matter of general or public importance, or where a miscarriage of justice may have occurred or will occur if the appeal is not heard.[11]

[16] As this Court confirmed in *McAllister v R*, the threshold for a second appeal is high.[12] Leave will not generally be granted where the application raises issues calling for a factual assessment specific to the circumstances of the case in question.[13] Although the miscarriage test will extend to arguable errors by the Court below, not every such error will give rise to a miscarriage of justice.[14]

Proposed grounds of appeal

[17] There are two applications from the applicants. First, the applicants seek leave to adduce fresh evidence from two experts on the grounds that its exclusion risks a miscarriage of justice.

[18] Second, leave for a second appeal is sought on the grounds that the trial Judge accepted Mr Spearpoint's evidence as establishing beyond reasonable doubt that there were natural wetlands as defined in the PNRP on the applicants' Property and a miscarriage of justice has occurred as a result.

Proposed further expert evidence

[19] The applicants propose calling the evidence of Dr Keesing, a senior ecologist, and Dr Jack McConchie, a hydrologist, to contradict the evidence of Mr Spearpoint on his identification of the natural wetlands on the Property and his interpretation of the exclusions to the PNRP "wetland" definition. Both "tend to show" that the evidence was insufficient to establish to a criminal standard that natural wetlands were present on the site.

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11 Criminal Procedure Act 2011, s 253(3).
12 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.
13 At [36].
14 At [38].

[20] The applicants submit that the lack of credible challenge at trial failed to address Mr Spearpoint's failure to understand the "damp gully heads" exclusion, when those exclusions apply to most of the site, as their proposed evidence shows. Also, there was no cross-examination of Mr Spearpoint's application of the Clarkson methodology, which the applicants say was an error.

Discussion

A miscarriage of justice?

[21] The submissions for the applicants focus on two points relating to miscarriage of justice. The first is that judicial notice should be taken of the decision in *Greater Wellington Regional Council v Adams*, here the evidence of Drs Keesing and McConchie was preferred over GWRC's evidence, including Mr Spearpoint's assessment of alleged natural wetlands. [15]

[22] The respondent filed extensive submissions opposing leave to adduce further evidence as it is not fresh and does not affect the correctness of the verdicts judgment. The comparison sought to be drawn to the *Adams'* decision, the Council says, is misconceived. While we accept that the evidence is not fresh, (given that it could have been available at trial), we consider the proposed evidence may render the convictions unsafe, either in total or in part, such that its exclusion risks a miscarriage of justice.[16] We are reinforced in this view by the reliance placed by the trial Judge and the High Court Judge on Mr Spearpoint's expertise in wetland ecology and the lack of any "compelling evidence" to suggest he was in error.

[23] Notwithstanding the respondent's extensive submissions, the same trial Judge in *Adams* accepted the challenges raised by Drs Keesing and McConchie on the exclusions to the definitions of natural wetland and the hydrology assessments undertaken by the Regional Council. Although the area under consideration in *Adams* is different to the location and topography of the applicants' property, as the respondent submits, we cannot overlook that it was the absence of any expert ecology and

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15 *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25.
16 *Banks v R* [2004] NZCA 575; and *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25].

hydrology evidence that led the trial and appeal Judges to conclude there was no error in the Council's expert evidence.

[24] The second point raised by the applicants was the untimeliness of disclosure, impeding the applicants' ability to adequately defend the charges in the time available before trial. The disclosure of three substantial packages of relevant information, including Dr Spearpoint's evidence, was delivered to the applicants by way of USB drives on 26 February and 19 March 2021, approximately two to three months before the trial on 24 May.

[25] Mr Page explained his lack of IT skills to the Court on 7 May, when he requested hard copies of disclosure and these were provided on 8 May and 14 May. There were 2,138 pages together with videos in disclosure package one, 454 pages in disclosure package two, and a further 240 pages and further videos in disclosure package three, the latter of which was delivered on 14 May, ten days before the hearing.

[26] We acknowledge the fact, as the High Court observed, that the applicants were repeatedly advised before, during and after the trial, by Counsel for the respondent and the District Court, to obtain legal representation. However, the lateness of substantial disclosure so close to the trial date is concerning, particularly when the applicants were self-represented and had technological difficulties with soft data. This is an additional factor favouring the applicants in weighing the likely risk of a miscarriage of justice.

Conclusion

[27] We consider that the proposed fresh expert evidence highlights that the outcome of the trial was affected by the absence of any expert challenge to the respondents' principal ecology witness. The absence of such evidence together with the late disclosure raises a real risk that the applicants' convictions may be unsafe and a miscarriage of justice may have occurred.[17] For those reasons, we are satisfied that the applications for leave to adduce further evidence and leave to bring a second appeal should be granted.

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[17] Criminal Procedure Act, s 232(4).

Result

[28] The application to adduce fresh evidence is granted.

[29] The application for leave to bring a second appeal is granted.

Solicitors:
Upper Hutt Law Ltd, Upper Hutt for Applicants
Luke Cunningham Clere, Wellington for Respondent