

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA588/2024
[2025] NZCA 139**

BETWEEN LE CHEN
 Applicant

AND WENJUN SUN AND LEI WANG
 Respondents

Court: Campbell, Peters and Powell JJ

Counsel: Applicant in person
 M J Smit for Respondents

Judgment: 2 May 2025 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

The application for leave to bring a second appeal is declined for want of jurisdiction.

REASONS OF THE COURT

(Given by Campbell J)

[1] Mr Chen applies both for leave to bring a second appeal and for leave to bring his application out of time.

Background

[2] Mr Chen was a residential tenant of the respondents, Ms Sun and Mr Wang. A dispute between the parties was heard by the Tenancy Tribunal (the Tribunal). The Tribunal terminated the tenancy and ordered Mr Chen to pay rental arrears,

subject to a deduction of \$75.88 in favour of Mr Chen representing a refund of electricity charges that he had overpaid.

[3] Mr Chen appealed the part of the Tribunal's decision relating to the refund of overpaid electricity charges. On appeal, he claimed that the respondents had been dishonest or fraudulent in the Tribunal in their evidence as to the electricity charges. Judge Kelly dismissed Mr Chen's appeal on 6 October 2023, holding that Mr Chen had not established any evidential foundation for a *prima facie* case of fraud.¹ The Judge accepted the respondents' explanation that two versions of electricity charges had been presented because they had been created from incomplete records.²

[4] In parallel with that civil appeal, Mr Chen brought a private prosecution against the respondents by filing charges in the District Court for conspiring to defeat justice, fabricating evidence and giving false oaths. The foundation of these charges was the alleged discrepancy in the respondents' evidence in the Tribunal as to the electricity charges. Mr Chen took the view that the discrepancy could be explained only by the respondents' deliberate dishonesty.

[5] A question arose as to whether the private prosecution should continue given the dismissal of the civil appeal. This matter was determined by Judge Hix on 6 December 2023.³ Judge Hix considered that Mr Chen was effectively relitigating the civil appeal.⁴ Accordingly, he directed under s 26(3) of the Criminal Procedure Act 2011 that Mr Chen's charging documents not be accepted for filing.⁵ The Judge acknowledged there was some uncertainty as to whether he had jurisdiction to make that direction (as it was not clear whether the charging documents had been referred to him by a Registrar under s 26(2)).⁶ Judge Hix therefore also dismissed the charges under s 147 of the Criminal Procedure Act, on the basis that the charges were an abuse of process with a weak evidential foundation.⁷

¹ *Chen v Wang* [2023] NZDC 21557 at [39].

² At [40].

³ *Chen v Sun* [2023] NZDC 27532.

⁴ At [16] and [21]–[22].

⁵ At [22].

⁶ At [13] and [23].

⁷ At [23]–[24].

[6] Mr Chen appealed Judge Hix’s decision to the High Court. Cull J held that the District Court had already accepted Mr Chen’s charging documents for filing and it was not open to Judge Hix to make a direction under s 26(3). Cull J therefore set that direction aside.⁸ She then turned to the s 147 decision. She noted that although there is no general right of appeal against a decision under s 147, either party may appeal on a question of law against a trial court’s ruling.⁹ However, Mr Chen’s appeal did not identify any questions of law. Instead, he sought to challenge a factual finding. Cull J concluded that there was no jurisdiction for Mr Chen to appeal the s 147 decision to dismiss the charges.¹⁰ She went on to find, in any event, that Mr Chen’s private prosecution was an abuse of process as it constituted a collateral attack on the Tribunal’s decision and on the District Court judgment on the civil appeal.¹¹ Cull J therefore dismissed Mr Chen’s appeal.¹²

Mr Chen’s applications

[7] Mr Chen applies under s 303 of the Criminal Procedure Act for leave to bring a second appeal. He filed his application about three weeks late, and so also applies for leave to bring his application out of time.

[8] Mr Chen indicated that he would seek an adjournment but did not pursue any such application.¹³ In the absence of a formal request for adjournment, and given that he later filed submissions for his leave application, we proceed with determining Mr Chen’s application for leave to appeal.

⁸ *Chen v Sun* [2024] NZHC 1948 [judgment under appeal] at [16]. Appeals under s 296 of the Criminal Procedure Act 2011 are generally not available from decisions under s 26(3) directing that charging documents must not be accepted for filing. This is because s 296 requires that a person be “charged” with an offence, and that requirement is not satisfied where the charging document has not been accepted for filing: *Mitchell v Tyson* [2016] NZHC 2210, [2016] NZAR 1545. The present case was different, because the charging documents had been accepted for filing before Judge Hix made the direction under s 26(3).

⁹ At [19]. See Criminal Procedure Act, s 296.

¹⁰ At [24].

¹¹ At [32].

¹² At [34].

¹³ Mr Chen’s stated reason for seeking an adjournment was to adduce the findings of an ongoing Ombudsman’s investigation. That investigation relates to a request by Mr Chen under the Official Information Act 1982 for all communications between the respondents and Tenancy Services. Notwithstanding the absence of a formal application, we are satisfied that the communications Mr Chen sought would not have changed the outcome of the application for leave.

Does this Court have jurisdiction to hear Mr Chen’s application for leave to bring a second appeal?

[9] To bring a first appeal on a question of law under s 296, Mr Chen required leave from the High Court.¹⁴ Despite Cull J saying that she was dismissing Mr Chen’s appeal,¹⁵ we consider the best reading of her judgment is that she declined leave to appeal. That view is consistent with her analysis and the language she used throughout the judgment.¹⁶

[10] For Mr Chen to seek leave from this Court to bring a second appeal under s 303, it is necessary that the first appeal court made a “determination of the first appeal”.¹⁷ Declining to grant leave does not constitute a “determination of the first appeal”.¹⁸ It follows that Mr Chen cannot apply for leave of this Court because there has been no determination of the first appeal by the High Court.

[11] The Court has no jurisdiction under s 303 to hear his application. For that reason, it must be declined.

If this Court does have jurisdiction, should leave be granted to bring a second appeal?

[12] In the event we are mistaken in our view that Cull J declined leave to appeal, and this Court does have jurisdiction to hear Mr Chen’s application, we consider whether leave should be granted to bring a second appeal.

[13] As to Mr Chen’s application for leave to bring his application out of time, Mr Chen’s explanation for his delay is not particularly persuasive. However, his delay is modest and the delay itself has not caused additional prejudice to the respondents. We would prefer to deal with the merits of the application for leave to bring a second appeal and so, if this Court has jurisdiction to hear his application, we would grant an extension of time.

¹⁴ Criminal Procedure Act, s 296(2).

¹⁵ Judgment under appeal, above n 8, at [34].

¹⁶ For example, after explaining that Mr Chen did not raise any question of law on his appeal, Cull J said at [24]: “There is no jurisdiction for Mr Chen to appeal the s 147 CPA decision to dismiss the charges.”

¹⁷ Criminal Procedure Act, s 303(1).

¹⁸ *Nottingham v District Court at Auckland* [2018] NZCA 345, [2018] NZAR 1308 at [17]–[18].

[14] Under s 303, this Court must not grant leave for a second appeal unless satisfied that the appeal involves a matter of general or public importance or that a miscarriage of justice may have occurred (or may occur unless the appeal is heard).

[15] Mr Chen has not identified any matter of general or public importance that would arise on the proposed appeal, and we see none. Nor is there any risk of a miscarriage of justice. The Tribunal and the District Court on the civil appeal unequivocally found that the discrepancies in the evidence on the electricity charges were explicable and did not provide any basis for alleging dishonesty to the requisite standard. We agree that the proposed private prosecution is a collateral attack on the Tribunal's decision and on the District Court judgment on the civil appeal, and therefore would be an abuse of process.

Result

[16] The application for leave to bring a second appeal is declined for want of jurisdiction.