

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA26/2023  
[2023] NZCA 541**

BETWEEN IAN LESLIE JOHNSTON  
Applicant  
  
AND ELECTRICAL WORKERS  
REGISTRATION BOARD  
Respondent

Court: Gilbert, Peters and Hinton JJ  
  
Counsel: M J Utting for Applicant  
S C Carter and A C R M Jeffares for Respondent  
  
Judgment: 2 November 2023 at 12 pm  
(On the papers)

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**JUDGMENT OF THE COURT**

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

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**REASONS OF THE COURT**

(Given by Peters J)

[1] The applicant, Mr Johnston, seeks leave to bring a second appeal against sentence and, in particular, against an order that he pay \$5,719 by way of reparation.<sup>1</sup> Churchman J dismissed Mr Johnston's first appeal in November 2022.<sup>2</sup>

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<sup>1</sup> *Electrical Workers Registration Board v Johnston* [2022] NZDC 21163 [District Court sentencing notes].

<sup>2</sup> *Johnston v Electrical Workers Registration Board (No 2)* [2022] NZHC 3190 [High Court judgment].

[2] The application for leave is supported by an affidavit from Mr Johnston. The respondent, the Electrical Workers Registration Board (EWRB), opposes leave.

[3] We may only grant leave to bring a second appeal against sentence if satisfied that the proposed appeal involves a matter of general or public importance, or if a miscarriage of justice may have occurred or may occur unless the appeal is heard.<sup>3</sup> That a successful appeal may not lead to a materially different outcome is relevant to the required assessment.

### **Introduction**

[4] Mr Johnston pleaded guilty to one charge of doing unauthorised electrical work, an offence under ss 74 and 162 of the Electricity Act 1992, and punishable by a fine of up to \$50,000.

[5] When sentencing Mr Johnston in September 2022, Judge A S Greig ordered him to pay a fine of \$1,000 and \$5,719 in reparation. The reparation ordered was in respect of loss that Mr Johnston's offending was said to have caused to a Mr and Mrs Clark. Amongst other things, Mr Johnston's offending was said to have delayed the Clarks in commencing building work by 12 weeks, this in turn prolonging the period for which they were in rented accommodation. Of the reparation ordered, \$4,380 was for rent and it is that portion of the reparation which Mr Johnston wishes to pursue on appeal. There is no issue as to the balance of the reparation, nor as to the fine imposed.

[6] The Court may impose a sentence of reparation in the circumstances of s 32 of the Sentencing Act 2002 (the Act). In essence, s 32 permits the Court to order an offender to pay a sum in respect of direct or consequential loss or damage to property or emotional harm caused by offending of which an offender has been convicted.<sup>4</sup> Mr Johnston's consistent position has been that his offending did not delay the

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<sup>3</sup> Criminal Procedure Act 2011, s 253(3).

<sup>4</sup> Mr Johnston's offending was an infringement offence and, as such, did not attract a conviction. However, the effect of s 375(1) of the Criminal Procedure Act is to permit the Court to make any order it would be authorised to make if it were able to convict the defendant of the offence.

commencement of the Clarks' building work, and thus he is not liable for the sum claimed by way of rent.

## **Background**

[7] The charge against Mr Johnston arose from work he did in early-2019 on a subdivision that he and his wife were then undertaking.

[8] Believing it would assist purchasers, Mr Johnston laid underground electrical cables from the boundary of the subdivision to several lots. Even though he did not connect the cables to points of supply, his actions constituted "prescribed electrical work" which he was not authorised to undertake. As a result, it was necessary for a certificate of compliance to be issued before the cables could be used for their intended purpose.

[9] Mr and Mrs Clark purchased one of the lots in early-2021. Shortly thereafter, they were informed that the cabling was non-compliant. After some "back and forth" with Mr Johnston, the required certificate of compliance was issued on 6 May 2021.

[10] Following a complaint by the Clarks, the EWRB charged Mr Johnston in March 2022. It is relevant to note two matters arising in respect of the summary of facts accompanying the charge. The first was that the summary included the following statement: "The Clarks were not able to proceed with their build." The second is that, as Mr Utting for Mr Johnston submits, although the EWRB sought legal and other costs, there was no mention of reparation in the summary.

## *Sentencing*

[11] At Mr Johnston's request, Judge G F Hikaka gave a sentence indication on 26 May 2022. The Judge indicated that if Mr Johnston pleaded guilty, the starting point would be a fine of \$3,000, with some reduction for a guilty plea. The Judge also said that there might be an order for reparation in favour of the Clarks. By the time of the indication, Mrs Clark had filed a victim impact statement (VIS), setting out the costs she and her husband contended they had incurred as a result of the offending, including the additional rent.

[12] Given that, regardless of the absence of any reference to reparation in the summary of facts, Mr Johnston was on notice from this point that reparation might be ordered in favour of the Clarks.

[13] On 2 June 2022, Mr Johnston accepted the Judge's indication and entered a guilty plea. The Judge ordered the preparation of a reparation report.

[14] The effect of Mr Johnston's guilty plea was to commit him to the matters stated in the summary of facts, including the statement referred to in [10] above. If there was any dispute as to the content of the summary, the proper course for resolution was a disputed facts hearing pursuant to s 24 of the Act. In his submissions, Mr Utting makes the point that the onus would have been on the EWRB to prove Mr and Mrs Clarks' loss. That may be so, but at the very least it was for Mr Johnston or Mr Utting to put the EWRB clearly on notice prior to the guilty plea that there was a significant dispute as to whether Mr Johnson's offending had delayed the Clarks, and that the EWRB was put to proof on this matter.

[15] Turning to the reparation report, there is no evidence before us as to what precisely Judge Hikaka ordered the writer of the report to address. However, the effect of the evidence before us from Mr Johnston is that he expected the report to address both causation and quantum. As it happened, the report simply confirmed Mr Johnston's ability to pay reparation.

[16] On 30 September 2022, Mr Johnston appeared for sentencing before Judge Greig, Judge Hikaka being unavailable.

[17] The Judge's sentencing notes record that Mr Utting disputed that any reparation should be ordered at all, and alternatively disputed that Mr Johnston's offending had caused delay to the Clarks' build. As to the latter, Mr Utting's submission to the Judge was that it was difficult to contest the sums put forward by the Clarks, and also that delays in building work were endemic at the relevant time. Despite acknowledging that "there is a lot of truth in that", the Judge ordered

Mr Johnston to pay the reparation sought on the basis the Clarks had incurred the costs “as a result” of the offending.<sup>5</sup>

[18] Having ordered Mr Johnston to make reparation, the Judge reduced the foreshadowed fine to \$1,000.<sup>6</sup>

#### *Appeal to the High Court*

[19] On appeal to the High Court, Mr Johnston sought to file fresh evidence, being an affidavit he had sworn, giving a full account of his position. Of particular relevance to this application is Mr Johnston’s (proposed) evidence that he understood the reparation report would address causation and quantum, and also that he had ascertained from the local authority that the Clarks only applied for building consent on 31 March 2021, with consent being issued on 18 May 2021. The import of this evidence was that the Clarks could not have commenced building work prior to 18 May 2021 by which time the necessary certificate for the cabling had been issued.

[20] Churchman J declined to admit Mr Johnston’s affidavit on the ground that the evidence was not fresh as it could, with reasonable diligence, have been obtained when the matter was before the District Court. In addition, the Judge did not consider the evidence would have affected the sentence in any event.<sup>7</sup>

[21] As for Mr Johnston’s appeal, Churchman J essentially proceeded on the basis of the summary of facts, that is that Mr and Mrs Clark had been unable to proceed with commencing their building work because of the offending. Churchman J was not willing to entertain any challenge to the matter of causation, given this statement in the summary.<sup>8</sup>

[22] The Judge was also critical of the submission for Mr Johnston that he had expected the reparation report to address causation and quantum, saying this is not the purpose of such a report.<sup>9</sup> As Mr Utting submits, however, that is not correct.

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<sup>5</sup> District Court sentencing notes, above n 1, at [15].

<sup>6</sup> At [16].

<sup>7</sup> High Court judgment, above n 2, at [27]–[29].

<sup>8</sup> At [34].

<sup>9</sup> At [28].

Sections 33 and 34 of the Act contemplate that a reparation report may well address these very matters.

### **Proposed appeal**

[23] Mr Utting submits the proposed appeal satisfies both limbs of s 253(3) of the Criminal Procedure Act 2011.

[24] The matters of general or public importance said to arise are, first, the proper construction of s 32 of the Act and, secondly, the circumstances in which leave should be granted to adduce further evidence on a first appeal.

[25] As to the second limb, Mr Utting submits that Churchman J's refusal to allow Mr Johnston to adduce further evidence on appeal gave rise to a miscarriage of justice.

### **Discussion**

[26] We are not satisfied that either of the grounds on which we may grant leave to bring a second appeal is satisfied, and thus decline this application.

[27] First, we do not consider any real issue arises as to the proper construction of the relevant provisions of the Act. Mr Utting is correct that, by s 32(1), a reparation order may only be made in respect of loss or harm caused to another person by the offending.

[28] Secondly, we are not persuaded that any issue arises as to the circumstances in which fresh evidence is to be admitted on appeal. The criteria are already well-established. The evidence must be credible, fresh and cogent.<sup>10</sup>

[29] It is because of that, and particularly the requirement that the evidence be fresh, that a successful challenge to the Judge's refusal to admit Mr Johnston's affidavit is most unlikely. As we have said, the difficulty in this case stems from Mr Johnston's acceptance of the summary of facts without a clear and timely challenge to the critical

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<sup>10</sup> *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193; and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6].

part of it. It was simply too late to make that challenge on appeal, however compelling Mr Johnston's affidavit may have been.

[30] In dismissing this application we also take into account that Mr Johnston's financial position might not be substantially improved even if he were to succeed on appeal.

[31] First, if the sum ordered for reparation were to be reduced by as much as the rent (\$4,380), then it is quite possible the Court would increase the fine imposed on Mr Johnston to an amount closer to the \$3,000 starting point indicated by Judge Hikaka.

[32] Secondly, as we have said, reparation may also be ordered to compensate for emotional harm. Mrs Clark's VIS referred to the stress and upset the issue had caused her and her husband. It is clear from Judge Greig's sentencing note, and Churchman J's decision, that both found that aspect of the VIS highly persuasive. Accordingly, even if Mr Utting's submission as to the absence of causation between the offending and the rent claimed was upheld, it is quite possible there would be an order for reparation in respect of emotional harm.

[33] To conclude, the proposed appeal does not raise any issue of general or public importance and there does not appear to have been a miscarriage of justice.

## **Result**

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

Solicitors:  
Thomson, O'Neil & Co, Eltham for Applicant  
Crown Solicitor, Wellington for Respondent