

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 75/2023  
[2023] NZSC 125

BETWEEN DANNY JOHN CANCIAN  
Applicant

AND TAURANGA CITY COUNCIL  
Respondent

Court: Glazebrook, O'Regan and Kós JJ

Counsel: Applicant in person  
R J A Marchant and S C M Waalkens for Respondent

Judgment: 19 September 2023

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1] The applicant was convicted in the District Court at Tauranga, on three charges of carrying out building work otherwise than in accordance with a building consent, contrary to s 40 of the Building Act 2004,<sup>1</sup> a fine of \$60,000 then being imposed by way of sentence.<sup>2</sup> The charges arose from a development known as The Lakes undertaken by the applicant's building company, Bella Vista Homes Ltd. The project was halted by Worksafe and the respondent council following construction safety concerns.

[2] The applicant then appealed conviction and sentence to the High Court. Lang J allowed the conviction appeal on one of the charges but upheld the remaining two

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<sup>1</sup> *Tauranga City Council v Cancian* [2020] NZDC 25470 (Judge Mabey KC).

<sup>2</sup> *Tauranga City Council v Cancian* [2021] NZDC 7606 (Judge Mabey KC).

relating to two particular properties within the development.<sup>3</sup> The sentence imposed was reduced to \$36,000.<sup>4</sup>

[3] The applicant then sought leave in the Court of Appeal to bring a second appeal against conviction. He also sought leave to adduce further evidence. That Court declined both applications.<sup>5</sup> Specifically, it held the proposed appeal neither involved a matter of general or public importance nor would a miscarriage of justice occur if the appeal was not heard.<sup>6</sup>

[4] The applicant now seeks leave to bring a third appeal. Such an appeal is not possible where leave has been refused by the second appeal court.<sup>7</sup> We treat the application instead as an application to appeal the High Court decision directly to this Court.<sup>8</sup> However, a heightened threshold applies in such a case: not only must one of the ordinary leave criteria in s 74 of the Senior Courts Act 2016 be met but, even then, this Court must not grant leave unless there are “exceptional circumstances that justify taking the proposed appeal directly to the court”.<sup>9</sup>

### **Proposed appeal**

[5] The applicant seeks leave to appeal under s 74(2)(a) and (b) of the Senior Courts Act on the basis that his proposed appeal involves a matter of general or public importance, or that a substantial miscarriage of justice will occur if his appeal is not heard. His grounds include that the Judges in the Courts below did not give proper consideration to evidence in relation to one property; that the respondent council failed to disclose material evidence relating to the other property; that the respondent’s lawyers withheld evidence, submitted false documents and engaged in “discrimination”; and that his own defence counsel failed to present crucial evidence that would have exonerated him, deviated from instructions and made submissions without consent.

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<sup>3</sup> *Cancian v Tauranga City Council* [2022] NZHC 556 (Lang J).

<sup>4</sup> *Cancian v Tauranga City Council* [2022] NZHC 862 (Lang J).

<sup>5</sup> *Cancian v Tauranga City Council* [2023] NZCA 257 (Clifford, Wylie and Whata JJ).

<sup>6</sup> Criminal Procedure Act 2011, s 253(3).

<sup>7</sup> Section 213(3). See also *Lihou v R* [2015] NZSC 161; *Gorgus v R* [2016] NZSC 161; and *Brown v New Zealand Police* [2017] NZSC 121.

<sup>8</sup> See, for example, *Basnyat v New Zealand Police* [2019] NZSC 21 at [2].

<sup>9</sup> Senior Courts Act 2016, s 75(b).

## **Our assessment**

[6] The criterion for leave in s 74(2)(a) is not met in this case. The proposed appeal turns entirely on its own particular facts. It does not raise a matter of general or public importance.

[7] The criterion for leave in s 74(2)(b) is not met either. We do not consider the arguments advanced by the applicant in relation to either property have sufficient prospects of success to enable us to conclude that a substantial miscarriage of justice will occur unless the appeal is heard. In particular, we are not persuaded that the assessments made in [30]–[31] of the judgment of the Court of Appeal are in error. The applicant has sought to reframe his appeal and advance fresh arguments not considered below in the High Court (and therefore in the Court of Appeal). We do not consider that an appropriate course here. The alleged errors by defence counsel were not advanced below because that counsel was still engaged, but are unsupported by any affidavit evidence from the applicant.

[8] Finally, the heightened threshold for a direct appeal is not met in this case either. Exceptional circumstances do not compel the grant of leave.

## **Result**

[9] The application for leave to appeal is dismissed.

Solicitors:  
Rice Speir, Tauranga for Respondent