NOTE: ORDER PROHIBITING PUBLICATION OF THE MEDICAL EVIDENCE RELATING TO JULIE CROSBIE PURSUANT TO S 205 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 101/2024
[2024] NZSC 179

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

Court: Ellen France, Williams and Kós JJ

Counsel: S J Iorns, J C Sylvester and V M E Krebs for Applicants
R J B Fowler KC and A S Bagchi for Respondent

Judgment: 20 December 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicants seek leave to appeal from a decision of the Court of Appeal in which the Court resentenced them and declined to award costs under the Costs in

Criminal Cases Act 1967.[1] This judgment followed a decision of the Court of Appeal allowing, in part, their appeals against conviction.[2] To put the present application in context, it is necessary to say a little about the history of the matter.

Background

[2] Ms Crosbie owns 11.13 hectares of land in the Nikau Valley in the Kāpiti Coast District. She bought the land in 2019 to form it as a dry stock unit. Livestock were reintroduced and extensive development work carried out by Mr Page who is Ms Crosbie's partner. That work included building access tracks and stream crossings, reclamation of four areas the Greater Wellington Regional Council considered were wetland, and installation of water takes.

[3] Arising primarily out of the work done, 35 charges were brought against the applicants for breaches of the Resource Management Act 1991 (the RMA). Thirty-four of the 35 offences were said to have taken place over a period from 30 May 2019 to 5 August 2020 and to have involved either the introduction of stock into wetland areas or modification of those areas. The final charge related to an alleged contravention of an interim enforcement order the respondent (the Council) obtained from the Environment Court on 22 December 2020. That charge related to a failure by the applicants to keep livestock out of an effluent disposal field set up under easement arrangements for a neighbouring property. There were no wetland-related issues for that charge.

[4] The charges were treated by the District Court as comprising three categories, as follows: first, what the Court described as "operational charges" (arising out of farming operations or planned development); second, "abatement notice charges"; and third, "enforcement offending".

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1 *Page v Greater Wellington Regional Council* [2024] NZCA 383 (Collins, Brewer and Muir JJ) [CA resentencing judgment].

2 *Page v Greater Wellington Regional Council* [2024] NZCA 51 (Collins, Brewer and Muir JJ) [CA appeal judgment].

[5] To understand that categorisation, we note that the District Court described the charges as follows:[3]

> [7] The [operational charges] largely revolved around works done in watercourses and six natural wetlands contained on the property. Twenty-five charges each fall into this category and related to allowing cattle access to the wetlands, disturbing wetlands, undertaking earthworks in water bodies, the deposition of substances into water, taking water, and discharges of contaminants to water. …
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> [8] The [abatement notice charges] contained nine charges each involving contravention of abatement notices which the Council issued to the Defendants requiring them to either exclude stock from wetlands or not to undertake earthworks adjacent to surface water bodies. …
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> [9] The [enforcement offending] contains a single charge against each of you of breach of an enforcement order made by the Environment Court on 22 December 2020 by grazing livestock on an area of the property used as a wastewater disposal field for the nearby Nikau Lakes rural residential subdivision. …

[6] The applicants defended the charges. The primary factual issue between the parties was whether the relevant areas were "wetlands" for the purposes of the RMA and the Council's proposed Natural Resources Plan.

[7] The applicants were not legally represented at trial. They called no expert evidence. To prove that the relevant areas met the definition of wetlands the Council relied on evidence from Mr Owen Spearpoint, a member of the Council's environmental science team. His qualification is a trade certificate in horticulture. His evidence was preferred by the District Court and the applicants were convicted on all charges.

[8] At sentencing, Mr Page's offending was treated as more serious than that of Ms Crosbie as he undertook the work and she had "effectively handed over management of the property to him".[4] Judge Dwyer sentenced Mr Page to a term of three months' imprisonment concurrently in relation to the abatement notice offences

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3 *Greater Wellington Regional Council v Crosbie* [2021] NZDC 23312 (Judge Dwyer) [sentencing remarks].

4 At [20].

and the enforcement order offence.[5] He was convicted and discharged on each of the operational offences. Ms Crosbie was fined $47,500 in relation to the operational charges; $23,742 on the abatement notice charges; and on the enforcement order charge, $47,500.[6]

[9] The applicants appealed unsuccessfully against conviction to the High Court.[7] Essentially, the Judge accepted the evidence of Mr Spearpoint.

[10] The applicants appealed to the Court of Appeal. The Court granted leave to adduce further evidence including that of an expert ecologist, Dr Keesing, and a hydrologist, Dr McConchie.[8] The Council filed evidence also from an ecologist, Ms Dixon, and a hydrologist, Mr Hughes. All four experts were cross-examined in the Court of Appeal.

[11] The applicants did not challenge the conviction in relation to the breach of the Environment Court's interim enforcement order. Their appeal in relation to all but five of the other 34 charges was successful. Essentially, the Court found that, even allowing for the further evidence before that Court, the Council had not established beyond reasonable doubt that the relevant areas were natural wetlands nor, it followed, "significant natural wetlands".[9]

[12] The Court essentially accepted that Mr Spearpoint had applied a methodology (the Clarkson Method) to determine whether the areas were wetlands which had inherent limitations. The Court said that "[e]ven on its face, the Clarkson Method suggests a potential mismatch between the criminal standard, and what Ms Clarkson

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5 At [51]. The Judge noted the Probation report recommended against a fine given that, amongst other matters, there were already outstanding fines in the order of $24,700. There were previous convictions for contravening abatement notices and enforcement order and Mr Page had previously served home detention for such offences.

6 At [34].

7 *Page v Greater Wellington Regional Council* [2022] NZHC 762 (Gendall J).

8 *Page v Greater Wellington Regional Council* [2023] NZCA 20 (Collins, Muir and Cull JJ).

9 CA appeal judgment, above n 2, at [81].

and other ecologists may regard as a wetland."[10] The Court took the view that even though application of the:[11]

> … associated Prevalence Test may ameliorate this level of uncertainty, there remain, in our view, significant questions about whether the high standard of criminal proof is ever likely to be satisfied by a vegetative tool alone, at least in the absence of the criteria referenced in [41] above. Even then, a prudent prosecution would, in our view, reference hydrology and soils also. And, of course, at least in the pNRP context, there would also need to be proof of a natural ecosystem of animals adapted to wet conditions.

[13] As a result of the appeal, only the following convictions remained:[12]

(a) charges 1 and 9 (relating to the creation of a track adjacent to Area 3C which, in part, subsided into the intermittently flowing stream at the base of the gully);

(b) charges 3, 12 and 13 (relating to disposition of soils/sediment in the bed of a river or where it could enter water); and

(c) charge 35 (contravention of Environment Court Enforcement Order relating to livestock grazing in the effluent disposal field …).

[14] Following delivery of the judgment on the appeal, the Court of Appeal invited further submissions as to sentencing and costs. In this context, the applicants sought remittal back to the District Court for resentencing to preserve their appeal rights. Ms Crosbie sought a discharge without conviction[13] and Mr Page a conviction and discharge.[14] They also sought costs in relation to the appeal under the Costs in Criminal Cases Act.

[15] In its subsequent judgment, the Court decided to resentence referring to the protracted history of the matter.[15] For Ms Crosbie, the Court said a fine of $57,000 adequately reflected her culpability. In relation to Mr Page, the Court said it was appropriate to quash the sentence of imprisonment (already served). The Court said it would have imposed a sentence of three months' home detention. Three of the enforcement orders made in the District Court were quashed and the other enforcement order was modified.

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10 At [48].
11 At [48] (footnote omitted).
12 At [115] (footnote omitted).
13 Sentencing Act 2002, s 106.
14 Section 108.
15 CA resentencing judgment, above n 1.

[16] The Court declined to order costs under the Costs in Criminal Cases Act. The Court observed that the threshold for making an award under s 8 of that Act was a high one and did not consider there was any basis for making an award under s 13(3).[16] The Court dealt with this aspect shortly, stating as follows:[17]

> While the case was complex, there was nothing "special" about that complexity. The fact that the appeal by Mr Page and Ms Crosbie was substantially successful is not a basis for making an award of costs under either ss 8 or 13 of the Costs in Criminal Cases Act.

The proposed appeal

[17] The applicants wish to argue Ms Crosbie should have the opportunity to seek a discharge without conviction so the matter should be remitted back to the District Court for resentencing. This would allow for a full assessment of the appropriate penalty in light of the totality of offending and preserve appeal rights. They also say the Court of Appeal was wrong to observe Mr Page should otherwise have received home detention. Finally, they argue an award of costs is appropriate where the applicants have been put to considerable expense having convictions overturned that should never have been entered, and where the prosecution were on notice of this from an early point in the proceedings.

[18] While the appeal is brought primarily on the basis the sentence for Ms Crosbie is manifestly excessive and has given rise to a miscarriage of justice, the applicants also say the case provides an opportunity for this Court to give guidance on RMA sentencing and that this gives rise to a question of general or public importance.[18]

[19] The respondent, amongst other matters, queries whether the Court has jurisdiction to hear the proposed appeal on the basis s 243 of the Criminal Procedure Act 2011 applies with the result that, as this was a second appeal in the Court of Appeal, the appeal is limited to questions of law. Further, they say that no challenge is possible to the Court's observations about home detention as those are not a "determination" as is required under s 243(1).

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16 Section 13(3) of the Costs in Criminal Cases Act 1967 allowed for the Court to make an order for costs exceeding that provided for by regulation where satisfied, amongst other matters, that the complexity of the case makes it desirable to do so.

17 CA resentencing judgment, above n 1, at [32].

18 Senior Courts Act 2016, s 74(2)(a).

Our assessment

[20] The provision of sentencing guidance of the type the applicants consider the Court should provide would comprise a question of general or public importance.[19] However, we do not consider this case is an appropriate vehicle to address those issues. The question of broader guidance does not appear to have been a focus of argument in the Court of Appeal. There is now no issue about the sentence of imprisonment imposed on Mr Page and, as we shall address shortly, we see no risk of a miscarriage of justice in relation to the sentence imposed on Ms Crosbie. The proposed appeal does not raise a challenge to the principles applicable to a discharge without conviction and nor to the principles relevant to the imposition of a costs award under the Costs in Criminal Cases Act. No question of general or public importance accordingly arises on these facts.

[21] Nor do we see any risk of a miscarriage of justice in terms of the sentence imposed on Ms Crosbie in circumstances where the District Court described the enforcement offence as involving "deliberate defiance" of the Environment Court's order and where, as Judge Dwyer noted, the Council had been trying to get the applicants to stop what they were doing for some time.[20] The Court of Appeal's reasons for its decision on the resentencing were brief. But we do not consider the approach taken has given rise to a miscarriage of justice where the Court had set out indicatively the approach that might be taken in its judgment on the conviction appeals and had invited submissions. Ms Crosbie accordingly had the opportunity, which was taken up, to say why a discharge without conviction should be granted and the Court addressed the issue.

[22] Finally, nothing raised by the applicants suggests the Court of Appeal was wrong in its assessment that this case did not meet the threshold for making an award of costs.

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19 Section 74(2)(a).

20 Sentencing remarks, above n 3, at [24] and see at [25] and [27]. See also Senior Courts Act, s 74(2)(b).

Result

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

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