IN THE COURT OF APPEAL OF NEW ZEALAND

CA147/2013
[2013] NZCA 525

BETWEEN	ANTHONY DAVID BANBROOK Appellant
AND	THE QUEEN Respondent

Hearing:	21 October 2013
Court:	Miller, Venning and Andrews JJ
Counsel:	Appellant in Person J M Jelas and K S Graham for Respondent
Judgment:	30 October 2013 at 4.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed. The conviction and sentence stand.

B The standard conditions for home detention under s 80C(2) of the Sentencing Act 2002 are to apply.

C The sentence of home detention is to be served at the address identified in the report prepared for the District Court by the Department of Corrections in August 2012. Mr Banbrook must be at that address on 4 November 2013 at 2 pm and remain there pending the arrival of a probation officer and an officer of the company responsible for connecting the electronic monitoring system.

D The time for Mr Banbrook to pay the reparation of $75,000 is extended to 15 November 2013.

REASONS OF THE COURT

(Given by Venning J)

[1] Mr Banbrook pleaded guilty to one charge of making an untrue statement in a registered prospectus.[1] On 12 March 2013 Collins J sentenced him to eight and a half months' home detention and ordered him to pay reparation of $75,000 by 12 April 2013.[2] Immediately following sentence Mr Banbrook lodged this appeal seeking to set aside the conviction.

The background to the entry of the guilty plea and sentence

[2] Mr Banbrook, together with Mr Ludlow and Ms Braithwaite (Mr Ludlow's partner) were all directors of National Finance 2000 Ltd (NFL). Mr Ludlow was the sole shareholder and controlled the company. NFL failed and was placed in receivership and liquidation. Following an investigation Mr Ludlow was charged and convicted of a number of offences arising from his operation of the company, including one count of false accounting, six counts of theft by a person in a special relationship, seven counts under the Financial Reporting Act 1993 and one count of distributing a registered prospectus that included an untrue statement.

[3] Mr Banbrook and Ms Braithwaite were also charged with offences under the Financial Reporting Act and the Securities Act. The Financial Reporting Act charges were withdrawn. Ultimately Mr Banbrook faced one charge under s 58(3) of the Securities Act.

[4] Mr Banbrook applied for a stay of prosecution of that charge on the grounds:

(a) of undue delay in the prosecution contrary to s 25(b) of the New Zealand Bill of Rights Act 1990 (NZBOR); and

(b) that he could not have a fair trial, contrary to s 25(a) of the NZBOR.

---

1 Securities Act 1978, s 58(3).
2 *R v Banbrook* [2013] NZHC 462.

[5] In a judgment delivered on 12 June 2012 Ellis J declined Mr Banbrook's application for stay.[3]

[6] Mr Banbrook then pleaded guilty to the charge under the Securities Act on 22 June 2012. At the time Mr Banbrook was represented by counsel Mr Burns. In recording the guilty plea Woolford J noted:

> [2] The Crown submitted a summary of facts to the Court which was admitted by Mr Banbrook through counsel in its entirety.

[7] Mr Banbrook's sentencing was scheduled for 14 August 2012. As defence submissions were received late the sentencing was adjourned to 24 August. On 24 August Brewer J recorded that, given the issues that Mr Banbrook's then counsel, Mr Waalkens QC, took with the summary of facts (on Mr Banbrook's instructions), sentencing could not proceed as a disputed fact hearing would be required.

[8] The matter was remanded several times thereafter. A disputed fact hearing was scheduled for 10 days to commence 18 February 2013.

[9] Ultimately, the disputed fact hearing was not required. On 15 February 2013 Toogood J recorded that the Court had received, by courtesy of Mr Waalkens, an agreed summary of facts signed by Mr Banbrook indicating his acceptance of the summary then produced to the Court. The sentencing before Collins J proceeded on the basis of that agreed summary of facts.

[10] Although the original summary of facts[4] was not before this Court, Ms Jelas confirmed there were some changes from that in the agreed summary settled on 15 February 2013. Mr Banbrook confirmed that, in particular, the amended summary recorded Mr Ludlow's concession and acceptance that he had concealed a number of related party transactions from Mr Banbrook and Ms Braithwaite.

---

3 *R v Banbrook* [2012] NZHC 1318 [stay decision].

4 Presented as an admitted summary to Woolford J on 22 June 2012.

The basis for the appeal

[11] Mr Banbrook seeks to set aside his guilty plea and conviction on the basis that his guilty plea was induced by a ruling of the Court (Ellis J's decision declining a stay) which was erroneous as a matter of law. He submits that he effectively had no option but to plead guilty following that decision, bearing in mind the reverse onus on him under s 58(3) of the Securities Act.

Applicable principles

[12] As this Court said in *R v Le Page*:[5]

> [16] [I]t is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, of which *R v Stretch* [1982] 1 NZLR 225 and *R v Ripia* [1985] 1 NZLR 122 are examples.

Discussion

[13] As a starting point, there can be no doubt in this case that Mr Banbrook fully appreciated and understood his position when he pleaded guilty. Not only is he a lawyer but he was represented by counsel.

[14] In *Le Page* this Court then went on to outline three broad situations where a miscarriage of justice will be indicated:[6]

(a) where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;

(b) where, on the admitted facts, the appellant could not in law have been convicted of the offence charged;[7] and

---

5 *R v Le Page* [2005] 2 NZLR 845 (CA).
6 At [17]–[19].
7 *R v Mohammed* CA415/96, 13 November 1996.

(c) where the plea was induced by a ruling which embodied a wrong decision on a question of law.

[15] Mr Banbrook's appeal is premised on the basis that his case falls into the third category. Mr Banbrook considered that, as a consequence of Ellis J's ruling, he had no prospect of discharging the reverse onus on him under s 58(4) of the Securities Act as:

(a) the minutes of directors' meetings were not available; and

(b) key witnesses were not available.

[16] Not every ruling of the Court, contrary to an accused's interest, will be an erroneous legal ruling sufficient to support an application to vacate a guilty plea. Legal rulings vary greatly as to their impact.[8] As this Court noted in *Le Page* when discussing the concept of a plea induced by a ruling embodying a wrong decision on a question of law:

> [19] That description is of course apt to describe the situation in *Mohammed*, which type of case may also be seen as a subset of the third category. Examples are where a trial Judge wrongly concludes that there is no evidence sufficient to justify a defence being left to the jury (say provocation or self-defence) leaving the accused with no option but to plead guilty. In such cases, which will admittedly be rare, this Court would intervene to cure a miscarriage of justice which plainly flowed from the erroneous ruling. ...

[17] In *Le Page* the ruling concerned the admissibility of evidence. The High Court had ruled evidence following search of a vehicle as admissible. The guilty plea followed that ruling. This Court distinguished a ruling which has the effect of excluding a defence as a matter of law from one as to the admissibility of evidence. The latter was not sufficient to satisfy the exceptional circumstances required to set aside a guilty plea.[9]

[18] The Court went on to note:

---

8 *Le Page* at [20].
9 At [20].

> [21] This distinction is discussed in *R v Chalkley* [1998] QB 848. At p 864 Auld LJ in delivering the judgment of the Court of Appeal said this:
>
> > ". . . a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged."
>
> Earlier in the judgment the Judge made observations in a similar vein, namely that where a ruling renders a case "factually overwhelming" or "makes it harder" for an accused to mount a defence, such difficulty is insufficient to establish the necessary nexus between the ruling and the change of plea.

[19] In summary, *Le Page* confirms that the fact that an accused faces difficulties as a consequence of a pre-trial ruling which leads to a guilty plea on his or her behalf will not necessarily lead to the conclusion that the appellant had no choice. More is required for there to be a miscarriage of justice to support the guilty plea being set aside.

[20] Ellis J's decision to decline the stay does not fall into the category of a ruling which left Mr Banbrook with no option but to plead guilty. It remained open for Mr Banbrook to run his defence to the charge. Ellis J's ruling did not raise any legal impediment to Mr Banbrook defending the charge. It simply meant he had to go to trial on the evidence available. For a guilty plea to be set aside in the circumstances of an adverse ruling the test requires that there be no legal avenue left to an accused. It is not even enough if it could be said that his chances at trial have suffered a body blow.[10]

[21] In Mr Banbrook's case the Crown still had to prove that the statements in the prospectus were false. If it was able to prove they were, then the onus was on Mr Banbrook to prove that, pursuant to s 58(4) of the Securities Act, the false statements were either immaterial or that he had reasonable grounds to believe and did, up to the time of the distribution of the prospectus, believe the statement was

---

[10] *Le Page* at [23].

true.[11] The unavailability of the minutes and witnesses did not mean Mr Banbrook was prevented from running such a defence. At most they may have made it more difficult for him, but that is not sufficient in this context. Mr Banbrook could still have led evidence that he had a reasonable belief in the accuracy of the statements in the prospectus, and the grounds for that belief.

[22] There are further features of the present case which confirm that there is no miscarriage of justice in this case in holding Mr Banbrook to his guilty plea.

[23] As noted, Mr Banbrook was in receipt of advice at the time he entered the plea. He made an informed decision to plead guilty, and could not be said to have been under any particular pressure when he did so on 22 June 2012. The trial was not scheduled to start until 5 July 2012, almost two weeks later.

[24] Further, insofar as Mr Banbrook submits he lost the ability to argue he had reasonable grounds for his belief the statements were true, by his own admissions he has effectively conceded that he did not have reasonable grounds for such a belief. Mr Banbrook had the opportunity to go to a disputed fact hearing but chose not to. The final summary of facts signed off by him recorded, inter alia, that the prospectus contained untrue statements about related party lending, provisioning for bad debts and the types of assets or security held. It then went on:

> 1. Executive Summary
>
> (h) Mr Banbrook's culpability relates to his abject failure to perform his role as a director. He was grossly negligent in that he ignored or abdicated his director responsibilities. He did not take the basic steps required to ensure that he was aware of the true position of the company.

And then later:

> 7.1 [NFL] suffered as a result of poor governance. Specific examples of poor governance were as follows:
>
> (g) Quarterly Directors' reports were prepared by Mr Gray. They were sometimes shown to Mr Banbrook and Mrs Braithwaite, but they were not questioned.

---

[11] In this context the distribution is ongoing: *R v Steigrad* [2011] NZCA 304, [2011] NZCCLR 24.

[25] In light of those concessions there was no prospect of Mr Banbrook making out a defence he had reasonable grounds to believe the statements in the prospectus were true. He had abrogated his responsibility as a director. Mr Banbrook sought to suggest that he only made those concessions in light of the position he found himself in. He submitted they were not so much agreed concessions as positions reached at the end of negotiation. He said he considered he had no choice. We do not accept that. Mr Banbrook was advised by senior counsel throughout and, as noted, could have gone to a disputed fact hearing or, prior to the guilty plea, to trial.

[26] Further, when interviewed by the probation officer for the pre-sentence report, Mr Banbrook is recorded as stating:

> In explanation Mr Banbrook said he was a non-executive director with NFL whose role was to review the financial accounts and prospectus. He said he had no involvement in the operations of NFL and entrusted the governance and integrity of the internal accounting system to the executive director. He confirmed NFL had commissioned him legal work to pursue the company's outstanding contracts (doubtful debts). He said he was unaware NFL had breached the financial reporting standards, because of his limited knowledge of the financial matters and believed the prospectus that he signed-off at the time had been true and correct.

[27] We do not accept Mr Banbrook's submission that is not an accurate record. The detail of the information would have been unknown to the probation officer. While it may have been very difficult for Mr Banbrook to make out a defence of reasonable belief in the truth of the statements in the prospectus, the reason for that difficulty was not because of any lack of minutes or the unavailability of any witnesses but rather the merits of Mr Banbrook's case as conceded by him.

[28] There is one final matter which puts this issue beyond doubt. While there was no right of appeal from Ellis J's decision,[12] the ruling was not final on the issue of the stay. Ellis J expressly reserved Mr Banbrook's position in the event that during trial he was able to adduce further evidence or point to further circumstances that would, at that time, have supported a stay. The Judge recorded:[13]

> [47] Although, as I have said, I am prepared to accept that there is an "in principle" fair trial risk, I am not prepared to find that it warrants a stay. It

---

12 *R v S* [2008] NZCA 382; *Postlethwaite v R* [2012] NZCA 170 at [4].

13 Stay decision, above n 3.

> will of course remain open to the trial judge to revisit that matter should that seem warranted.

Ellis J's decision

[29] Despite our conclusion that this is not a case where an appeal against conviction is available to Mr Banbrook, we briefly consider the correctness of Ellis J's decision to decline the stay as that matter was addressed by both counsel.

[30] We agree with Ellis J's dismissal of Mr Banbrook's complaint about the pre-charge delay for the reasons she set out. In brief, a three year limitation period applies to laying charges under s 58(3)[14] and, in any event, the critical delay for the purposes of s 25(b) NZBORA is not pre-charge delay but the delay between the laying of the charge and trial. The existence of any pre-charge delay is only relevant to the issue of whether there is prejudice to the accused by the overall delay in disposition of the charges.

[31] Next, we agree with Ellis J that the post-charge delay was not, in the context of a multi accused finance company trial, excessive. The values underlying s 25(b) were not unduly abrogated by the delay post-charge.[15] That is particularly so where, as in this case, 15 and a half months of the delay resulted from Mr Banbrook seeking longer and longer time for the depositions hearings but then ultimately conceding a prima facie case on the first morning of the depositions hearing.

[32] The final issue is that of prejudice. The combined period of delay was not such as to support a stay on the grounds of general prejudice. The particular factors raised by Mr Banbrook of special prejudice were:

(a) the loss of the minutes of the directors' meetings; and

(b) the unavailability of certain witnesses.

[33] Mr Banbrook submitted that there were a number of directors' meetings, that there were minutes of those meetings, and that the receivers had lost the minutes.

---

[14] Securities Act, s 64.
[15] Stay decision at [31].

Mr Banbrook pointed to correspondence with the receivers to support his submission that the receivers have lost copies of the minutes. He relied in particular on a letter from the receiver, Mr McCloy, of 14 March 2012 in which Mr McCloy said:

> We have reviewed the index of company records archived for National Finance and retrieved a box which had a folder noted as containing a section titled "director minutes of meetings". However, that section of the folder was empty. There are no other minutes of directors' meetings contained within the index.

[34] But that letter must be read in light of earlier correspondence on the issue. In response to a letter from Mr Banbrook of 9 December 2011 in which he had recorded that in May 2006 he had delivered a number of Eastlight folders containing records and legal papers, the property of NFL, to the receivers, Mr McCloy replied on 8 February 2012:

> We have retrieved the National Finance records provided by your office following the receivership from archives. There were no minutes of directors' meetings contained within those records.
>
> Enclosed is a copy of a letter from you dated 14 June 2006 in respect of records held, *in which you note that you did not hold any formal or statutory documents on behalf of National Finance*. The records subsequently provided by you related to litigation you had been undertaking at the request of National Finance. A copy of the cover letter from you dated 6 July2006 is also enclosed.
>
> (Emphasis added.)

[35] We do not consider the correspondence or evidence supports Mr Banbrook's submission that the receivers lost the minutes. Nor does it support the suggestion that Mr Banbrook gave his set of minutes to the receivers.

[36] That is important because if minutes were kept as Mr Banbrook says, there would be copies retained by the company but also each director should have had his or her own set. Mr Banbrook has sworn three affidavits in relation to this matter, two for the purposes of the stay application and one for the purposes of this appeal. In none of those affidavits does he expressly state that he had provided his copies of the minutes to the receivers. Further the final summary of facts signed off by him

records that no formal board minutes or papers were kept past the first four to five months of Mr Gray's employment.[16]

[37] In any event, it must be a matter of speculation whether or not the minutes would have assisted Mr Banbrook in his defence. When this point was put to Mr Banbrook he was unable to point to any particular matter in the minutes he relied on. To the extent Mr Banbrook was concerned about issues that were discussed at directors' meetings then presumably he would remember those issues as important to him. The defects in the prospectus concern issues such as related party lending which was very material in the case of NFL. Had Mr Banbrook made proper inquiry into this matter at the time, one would expect him to recall and raise it when first charged. There is nothing to suggest he did. One might also expect there to be other company documents which might assist him to recall the subject matter of any discussions at board meetings. Finally on this point, the lack of minutes is of limited relevance to some issues. The lack of minutes could not, for instance, explain the failure of the company to have had an audit committee or a loan committee.

[38] Nor is the argument that Mr Banbrook is prejudiced by the unavailability of witnesses particularly strong. We consider Ellis J was right to conclude that the unavailability of witnesses did not, on the evidence before her, amount to sufficient prejudice to support the stay.[17]

[39] As the Judge noted, the significance of Mr Montgomerie's death is unclear. It also remains unclear whether Mr Banbrook intended to call him as an expert or a witness of fact. If as an expert, there must have been other experts available to Mr Banbrook. If as a witness of fact, then as the charge was originally laid in September 2008 Mr Banbrook has not satisfactorily explained what steps he took between that date and Mr Montgomerie's death in 2011 to obtain a witness statement from him. Similar issues arise in relation to the other witnesses that Mr Banbrook identified, Mr Cunningham and Ms Larkins. Mr Banbrook has taken no or few steps to try and locate either of them or to explain the significance of their proposed evidence.

---

16 Mr Gray commenced employment in early 2004.

17 Stay decision at [42].

[40] We are satisfied the Judge was right to dismiss the application for stay on the information before her.

Result

[41] The appeal is dismissed. The conviction and sentence stand.

[42] The standard conditions for home detention under s 80C(2) of the Sentencing Act 2002 are to apply.

[43] The sentence of home detention is to be served at the address identified in the report prepared for the District Court by the Department of Corrections in August 2012. Mr Banbrook must be at that address on 4 November 2013 at 2 pm and remain there pending the arrival of a probation officer and an officer of the company responsible for connecting the electronic monitoring system.

[44] The time for Mr Banbrook to pay the reparation of $75,000 is extended to 15 November 2013.

Solicitors:
Crown Law Office, Wellington for Respondent