

JERSEY / JUDGMENT

Kanetech Limited -v- AG

[2015] JRC 065 (30 March 2015)

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JUDGMENT

THE commissioner: 1. This is an appeal by Kanetech Limited ("Kanetech") against its conviction before the Magistrate on 18 th February, 2014, of sixteen counts of acting contrary to Article 33(1) of the Planning and Building (Jersey) Law ("the Planning Law") by undertaking prescribed building work without the permission of the Minister of Planning and Environment ("the Minister") under the Building Bye-laws (Jersey) 2007 ("the Bye-laws"). Kanetech was fined £250 on each count (£4,000 in total) and ordered to contribute £5,000 towards the cost of the prosecution. 2. The case has a convoluted history and raises issues in relation to abuse of process and the correct construction of the relevant statutory provisions. During the course of the hearing, the Court invited Kanetech to consider applying for leave to appeal against sentence out of time, which invitation Kanetech accepted. The Court thereafter granted leave to appeal against sentence out of time. 3. For the reasons set out hereafter, we dismiss the appeal against conviction. However, we allow the appeal against sentence by quashing the fines and the costs order and substituting an absolute discharge on each count. 4. We propose to begin by describing the factual background. We shall then summarise the history of the proceedings before turning first to consider the arguments in relation to abuse of process and thereafter those relating to the safety of the conviction. Finally, we shall deal with the question of sentence. Factual Background 5. The background has already been described in two judgments, namely that of William Bailhache, Deputy Bailiff, (Kanetech-v-AG

[2013] JRC 121), and that of the Magistrate at the conclusion of the trial dated 18 th February, 2014. For convenience, we propose to draw on those two judgments for this aspect of the case. 6. In recent years, the States has run an Energy Efficiency Service ("EES"), which is part of the Planning and Environment Department ("the Department"). A scheme known as the Home Energy Scheme ("the scheme") was developed on the basis that government money would be provided to eligible members of the public, especially those on low income or in receipt of heating allowances, to enable them to improve the energy efficiency of their homes. This would not only benefit the environment but would also save the recipients money on their fuel bills. 7. The procedure adopted was that local contractors would apply to EES for approval to do work under the scheme. The requirements for contractors were set out in a document provided by EES entitled

"Schedule of Works". Contractors had to agree to the terms set out in the Schedule of Works in order to be eligible to be assigned specific work by EES, for which they would be paid by EES. The contractual relationship was between EES and the contractor and the Schedule of Works was in essence the contract between them. Clause 3.2.4.9 of the Schedule of Works provided:- "Building Control notification and submittal, where required, shall be the responsibility of the Contractor prior to installation of the works commencing...." 8. Householders were entitled to apply to EES to benefit from the scheme. Once the householder was deemed to be eligible, EES would contact one of its approved contractors and retain that contractor to carry out the work in question. When the work was complete, the contractor would send an invoice to EES and be paid from EES funds. The householder was not obliged to pay anything or deal directly with the contractor other than to allow access to the premises. 9. Kanetech's business includes the installation of domestic heating boilers and it was one of the contractors which applied to EES to be included as an approved contractor to carry out work under the scheme. 10. According to the prosecution, application for building permission under the Bye-laws is required for the installation of heating boilers. There is however an exemption for contractors registered as members of OFTEC (a trade association for heating engineers and technicians). Such members benefit from an exemption so that boiler installations carried out by them do not require building permission. There is no dispute that Kanetech is not a member of OFTEC. 11. The prosecution case is that Kanetech was instructed by EES to install replacement heating boilers at sixteen different properties, which it did and for which it was paid. No building permission was applied for or granted in respect of any of the sixteen properties. It is said therefore that Kanetech undertook building work for which a building permission was required without such permission having been granted and was therefore guilty of an offence under Article 33(1) in respect of each of the sixteen properties. History of the proceedings 12. This case has had a protracted history and it is necessary to outline some of that history. The matter first came before the Magistrate's Court on 18 th June, 2012, following the issue of a summons. It would appear that at that stage the charges were brought against both Kanetech and Mr Kane personally. Mr Kane did not appear and his arrest was ordered. 13. The matter came back before the Court on 30 th August. There was some confusion as to whether the defendant was Mr Kane or Kanetech and the Centenier stated that, having spoken to the legal adviser and Mr Bolton, the Enforcement Officer at the Department, the charges should be put against Mr Kane and not the company. The charges were then put to Mr Kane (who was represented by the duty advocate) and the plea was reserved. The matter came back before the Court on 14 th September at which time Mr Kane was representing himself and an issue arose as to whether the charges should not be against him but should be against Kanetech. The matter was adjourned for the prosecution to consider the matter. There appear then to have been discussions between the prosecution and Mourant Ozannes representing Mr Kane with Mourant Ozannes urging that the charges should be against the company, not Mr Kane personally; see for example their email of 18 th October. 14. On 19 th October, when Advocate J Grace was representing Mr Kane, sixteen charges against Kanetech were

put and the plea was reserved. The charges were in identical form to those against Mr Kane except that the company was the defendant. On 31 st October the prosecution announced through Advocate Baglin, the legal adviser, that it was offering no evidence in relation to the charges against Mr Kane personally and would be proceeding only with those against Kanetech. Costs were awarded in favour of Mr Kane and Kanetech entered pleas of not guilty to the sixteen charges. 15. On 29 th November, Kanetech, now represented by Advocate Blakeley, took a preliminary point of law and argued that Kanetech could not be guilty of the charges because it was not the person proposing the work in question or undertaking it. Only the person who proposed the work could be the undertaker and that would be either the householder or EES. That submission was rejected by the Magistrate, but, at the request of Kanetech, she stated a case on a point of law for the consideration of the Royal Court. 16. Sometime thereafter, Advocate Blakeley ceased to act for Kanetech and Advocate Jowitt was instructed on behalf of the Attorney General to deal with the appeal by way of case stated. The matter was originally fixed for 12 th March, 2013, but was adjourned at the request of Kanetech. It came before the Royal Court in due course on 21 st June when the appeal was dismissed. Mr Kane represented Kanetech. The Deputy Bailiff agreed with the ruling of the Magistrate, namely that the essence of the offence under Article 33 was to undertake building work without the required building permission. Such an offence could be committed by the householder, a contractor or a sub-contractor. The question of which or how many of these to prosecute in any given case was a matter for the Attorney General. A contractor such as Kanetech which carried out the work in question was "undertaking" the relevant work. 17. Two further matters arose out of the appeal by way of case stated:- (i) Advocate Jowitt conceded that the charges in the form they were at that time were not well worded because they alleged that Kanetech had carried out the relevant building work "without having applied for a building permit". Advocate Jowitt conceded, and the Deputy Bailiff agreed, that this did not accurately reflect the offence under Article 33(1) which did not refer to the need to apply for a permit, only that it was an offence to undertake the work without a permission. (ii) The Deputy Bailiff noted that Kanetech had been employed as a contractor by EES, which was part of the Department which was responsible for granting building permissions and it was hard to understand why an approved contractor which was a member of OFTEC needed no permission whereas an approved contractor which was not a member of OFTEC but was paid the same rate for the job had to obtain a permission, thereby reducing its profit as compared with the OFTEC competitor. The Deputy Bailiff expressed surprise that Kanetech had been charged and invited the Attorney General to consider further whether it was in the public interest to continue the prosecution. 18. The Court was informed by Advocate Jowitt that during the course of July 2013, the Attorney General personally reconsidered the matter but maintained his view that the prosecution should continue. 19. On 13 th September, 2013, the Magistrate gave leave to the prosecution, represented by Advocate Jowitt, to amend the charges as envisaged in the hearing before the Royal Court, i.e. to make it clear that the offence alleged was of undertaking prescribed building work without a building permission rather than

undertaking such work without having applied for such permission. Kanetech, represented by Mr Kane, objected to the amendment on the grounds it was prejudicial but the Magistrate disagreed. She held that Kanetech was aware of the allegations and she did not consider there was any prejudice to Kanetech. 20. On 1 st October, 2013, Kanetech, represented by Mr Kane, made an application to stay the proceedings, which was treated by the Magistrate as an application to stay for abuse of process. The Magistrate dismissed the application. Subsequently Advocate Bell was instructed to represent Kanetech and on 2 nd December, he asked the Magistrate to state a case concerning her rejection of the abuse of process argument. The Magistrate declined to do so and fixed the trial for 9 th January, 2014. On 7 th January, 2014, Advocate Bell renewed his request for the Magistrate to state a case and to adjourn the trial but the Magistrate declined. The next day Advocate Bell applied to this Court for an order adjourning the trial and directing the Magistrate to state a case, but that application was refused, (Kanetech-v-AG

[2014] JRC 006). The Commissioner (then Bailiff) sat on that occasion and pointed out that Kanetech would be able to appeal against any abuse of process decision in the event of a conviction. 21. On 9 th January, 2014, Advocate Bell again appeared for Kanetech before the Magistrate. The prosecution were ready for trial and the witnesses were present. Advocate Bell asked for an adjournment because Kanetech now wished to renew the abuse of process argument in the Magistrate's Court but Advocate Bell was not ready to put that argument and asked for the case to be adjourned. The Magistrate refused to adjourn the case and gave Advocate Bell the rest of the morning to prepare. By mid-morning the Court was informed that Advocate Bell was no longer acting for Kanetech and that the legal aid office had agreed to appoint Advocate Pearmain under the legal aid scheme. 22. However she was no longer acting for Kanetech by the time the matter came on for trial on 17 th/ th February, 2014. Mr Kane, on behalf of Kanetech, made an application that the proceedings be stayed as an abuse of process. Evidence was heard, following which the application was rejected by the Magistrate. 23. Advocate Jowitt then applied for the evidence given in the abuse of process application to be adopted for the trial and this was granted by the Magistrate. The Court commenced to hear the evidence but, during the course of the evidence of the first witness, Mr Kane and his brother walked out of Court. They were warned that if they left, the trial would continue without them but they nevertheless did so. The company was therefore unrepresented from that point onwards. 24. The Magistrate heard the remaining evidence and found that all sixteen charges against Kanetech were proved beyond reasonable doubt. As already mentioned she sentenced Kanetech to a fine of £250 on each count and ordered the company to pay £5,000 towards the prosecution costs. 25. Kanetech duly filed a notice of appeal against conviction asserting that the grounds of appeal were "abuse of process", "wrong in law" and "excessive jurisdiction". 26. The appeal was adjourned on two occasions, namely 1 st May and 28 th November, 2014. It was clear to the Court that Mr Kane felt an enormous sense of injustice but might have some difficulty in formulating his concerns in a legally relevant manner. Accordingly, on 28 th November, the Court directed that an amicus be appointed. The

appeal came on for hearing on 11 th February, 2015. The Court had received written arguments from Advocate Cadin as the appointed amicus , from Mr Kane on behalf of Kanetech and from Advocate Jowitt. These were supplemented by oral submissions which took all day. The Court reserved its decision. The relevant statutory provisions 27. Article 33 of the Planning Law provides (so far as relevant) as follows:- "33 Prescribed building work not to be undertaken without building permission. (1) A person who undertakes prescribed building work except with and in accordance with, permission to do so granted by the Minister, in accordance with the Building Bye-laws shall be guilty of an offence and liable to a fine. (2) A person shall be guilty of an offence under paragraph (1) if when undertaking prescribed building work the person contravenes:- (a) a condition subject to which building permission to undertake that building work was granted; or (b) an applicable provision of the Building Bye-laws. ..." 28. The expression "prescribed building work" is defined in Article 1 of the Planning Law as meaning "building work for which permission is required under the Building Bye-laws". The Building Bye-laws ("the Bye-laws") are made by the Minister under Article 30 of the Planning Law. Bye-law 10 provides (so far as relevant):- "10 Application for building permit (1) Except as provided by bye-laws 14 and 15, a person who proposes:- (a) to carry out building work; or (b) ... must apply to the Minister for a building permit. (2) The application must be made in accordance with Article 34 of the [Planning] Law." 29. Bye-law 1 defines "building work" as:- "(a) ...

- (b) the provision or extension of a controlled service or fitting in or in connection with a building..." 30. "Controlled service or fitting" is defined in Bye-Law 1 as meaning "a service or fitting in relation to which Part 3, Part 6 or Part 11 of Schedule 2 imposes a requirement". Part 3 of Schedule 2 imposes requirements in relation to "combustion appliances". These are defined in Bye-law 1 as "a fixed heat producing appliance designed to burn solid fuel, oil or gas". 31. Putting these various provisions together, it would appear that the provision of a fixed heat producing appliance designed to burn oil is building work for which a building permit is required and is therefore prescribed building work for the purposes of Article 33. It is therefore an offence to undertake the provision of such an appliance without a building permission. Abuse of Process 32. It was not always easy to discern whether some of the arguments put forward to us were aimed more at the issue of abuse of process or at the safety of the conviction. We shall do our best to consider them under the appropriate heading and logically, the question of abuse of process should be considered before the question of conviction as, if successful, such an argument means that there should never have been a trial at all. 33. The principles in relation to staying a case for abuse of process are clearly established. They were authoritatively restated by the Privy Council in *Warren v AG*

[2011] JLR 424 where the headnote says this:- "(1) The court had power to stay proceedings for abuse of process in two distinct categories of case: first, where it would be impossible to give an accused a fair trial; and secondly, where it offended the court's sense of justice and propriety to be asked to try an accused in the particular circumstances of the case (to avoid confusion, the issue in the second category should not be framed as whether it would be "fair" to try the accused). In the first category, if the court concluded that an accused could

not receive a fair trial, it would stay the proceedings without more. No question of balancing competing interests would arise. In the second category, the court was concerned to protect the integrity of the criminal justice system. A balance had to be struck between the public interest in ensuring that those accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute..." 34. However, as stated in Archbold Criminal Pleading, Evidence and Practice Edition 2014 at para 4-75 in relation to the second category:- "The jurisdiction does not extend to staying a prosecution which the court considers is ill advised or unwise; the question whether to prosecute or not is for the prosecutor; if a conviction is obtained in circumstances where the court, on reasonable grounds, feels that the prosecution should not have been brought, this can be reflected in the penalty..." 35. Mr Kane and the amicus submit that the Magistrate should have found that there was an abuse of process under both categories. The submissions, particularly by Mr Kane, have been wide ranging and it has not always been entirely clear to which aspect they have been directed. We have accordingly done our best to categorise the various submissions as set out below. We propose to deal with the submissions in relation to category 2 first as it seems to us that it is that aspect which lies at the forefront of Kanetech's submissions.

- (i) Category 2: Protection of the integrity of the justice system
- (a) Unfairness of the Department being the investigatory authority 36. At the heart of the submissions on this aspect lies Mr Kane's strongly held belief that he is being prosecuted by the main wrongdoer. He points out that it was EES that commissioned the work, chose the contractor to carry it out (Kanetech) and then paid for it. The documents before the Court showed that EES was telling the householder that it (EES) would be responsible for everything once any application under the scheme was approved. It was therefore, he submitted, the Department (through EES) which was "undertaking" the work. The Minister was therefore the person who should have been prosecuted if anyone was. 37. Bye-law 10(1) provides that "... a person who proposes... to carry out building work... must apply to the Minister for a building permit..." It was EES i.e. the Minister, who proposed to carry out the work. It was therefore, he said, the responsibility of the Minister to seek and obtain building permission. It was 'illicit' for the Minister to seek to transfer the obligation to apply for building permission to Kanetech under the contract contained in the Schedule of Works. 38. Furthermore, although it was said that the decision to prosecute was that of the Law Officers' Department, it was noteworthy, said Mr Kane, that at the early hearings, the Centenier was looking to Mr Bolton (who was an employee of the entity which was the more appropriate defendant) for direction as to, for example, whether it was the company or Mr Kane that should be charged. Mr Kane submitted that Mr Bolton was in reality in charge of the prosecution. Support for this submission was to be found, he said, in a report dated February 2014 by the Deputy Chief Officer of the Department of Environment entitled "Shaping the Jersey Planning and Building Enforcement System for the Future" where in Section 5, it was noted that "the LOD was uncomfortable with prosecutions proceeding

without their input. They recognised how this had occurred due to historical circumstances but now require that the practice changes." The report went on to recommend at Recommendation 5.2 "Cases for prosecution must only proceed with the authorisation of the LOD". This suggested that previously cases had been proceeding without the involvement of the Law Officers' Department, which was what Mr Kane submitted, had happened in this case. Even if the prosecution was brought under the direction of the Law Officers' Department, the investigation had been carried out by an employee of one of the potential defendants and this rendered it an abuse of process to prosecute Kanetech. 39. We have carefully considered the submissions on this aspect, but in our judgment the Magistrate was right not to find an abuse of process on this ground. We have had the benefit of information provided by Advocate Jowitt as an officer of the court and that information is contained in paragraph 30 of his supplementary skeleton argument. From this it is clear that Mr Bolton's case file was submitted to the legal adviser to the States of Jersey Police (who is a member of the Law Officers' Department) in November 2011 and in December 2011 the legal adviser agreed that Kanetech Limited should be charged with sixteen contraventions. Thereafter it seems that questions were raised and the matter was referred to a senior lawyer within the Attorney General's department. Following advice from the senior lawyer, the Attorney General personally confirmed on 11 th April, 2012, that Kanetech Limited should be charged. The senior adviser then directed that charges be preferred against Kanetech Limited. 40. It is not clear how Mr Kane came to be charged and it seems that this may well have involved the Centenier and legal adviser receiving advice from Mr Bolton. Nevertheless it is clear that the decision to bring the prosecution against Kanetech was not taken by Mr Bolton but was, as it should be, taken by the Centenier on advice/direction from the Law Officers' Department. It is further the case that, following the judgment of the Deputy Bailiff, the matter was referred back to the Attorney General who personally decided that the prosecution should continue. 41. For reasons which will appear later, we accept that the Minister (through EES) was a potential defendant and that accordingly Mr Bolton was employed by a potential defendant. Nevertheless, we do not think that that makes any prosecution an abuse of process. The decision to prosecute was taken by the independent office of the Attorney General and the fact that the investigating officer was employed by a potential defendant does not result in the integrity of the justice system being in need of protection by staying the proceedings, given that the prosecution was under the control of the Attorney General. 42. Nor was Mr Kane correct to submit that the Schedule of Works was somehow 'illicit' in providing at Clause 3.2.4.9 that, as between EES and Kanetech as contractor, the responsibility for applying for building permission should rest with Kanetech. This was not transferring any criminal liability (which would not be possible); it was simply providing that, as between themselves, responsibility for obtaining permission would rest with Kanetech. Such a provision would not release EES (i.e. the Minister) from any criminal liability that otherwise existed. Nor are we assisted by the report referred to above at para 38. Regardless of what may have been the position in other cases, we have to consider the facts of this case. 43. In summary, this was a case which was investigated by an employee of a potential defendant, but where the decision to prosecute and the decision to

continue the prosecution was taken by the Attorney General as the prosecuting authority in the Island. In these circumstances it does not offend the Court's sense of justice or propriety for Kanetech to be tried.

- (b) Abuse to prosecute Kanetech when neither the Minister nor other plumbers were prosecuted. 44. As will appear later, we are satisfied that Kanetech undertook the installation of the sixteen heating boilers which were the subject of the charges, that this was prescribed building work and that no building permission was obtained. However, we agree that the Minister (through EES) also undertook that work because EES had instructed Kanetech to do it and paid for the work. It follows that the Minister (through EES) was also a potential defendant. We also accept that the evidence shows that there were other plumbers who apparently undertook work without getting the necessary building permission. It is submitted that it was so unreasonable as to be an abuse of process under Category 2 to prosecute Kanetech but not the Minister and other plumbers. In particular:- (i) The Minister was more involved in the work than Kanetech, in that EES was managing the whole scheme and paying for it. (ii) The whole purpose of the Bye-laws was to ensure that appropriate standards of safety, building standards etc. were adhered to. There could be no doubt that such standards had been satisfied in the present case. In the first place, all the work carried out by Kanetech had been "commissioned" i.e. signed off by an OFTEC qualified plumber. Secondly, the evidence showed that EES itself arranged for the work to be inspected by a Mr Le Lay so as to ensure that the requirements under the Bye-laws had been complied with and the work had been satisfactorily carried out. (iii) The obligation on Kanetech (rather than the Minister) to obtain building permission was contained in a short paragraph in the middle of a 66 page document. In any event the terms of that provision were not clear in that it referred to "Building Control" as a form of shorthand for building permission under the Bye-laws. 45. In response, Advocate Jowitt emphasised that the balancing of the various public interest factors was a matter for the Attorney General, not this Court. He accepted that there were arguments in favour of not proceeding with the prosecution. As against that the fact was that Kanetech had installed sixteen boilers for commercial reward at public expense amounting to in excess of £80,000, pursuant to a contract in which Kanetech had undertaken to apply for the necessary building permission. Kanetech had failed to honour that obligation and, when informed that the position could be rectified through a retrospective application, had refused to do so. In the circumstances, there were arguments both for and against a prosecution and it was for the Attorney General to decide where the public interest lay. It could not possibly be said that his decision to prosecute Kanetech (but not the Minister (through EES) or plumbers in other cases) was so unreasonable as to amount to an abuse of process. 46. In our judgment, Advocate Jowitt's submissions are correct. It is an important aspect of the abuse of process jurisdiction that the respective roles of the prosecution and the Court are not confused. It is for the prosecution to decide who should be prosecuted and for what offence. The fact that the Crown chooses to prosecute one of a number of potential defendants does not render it an abuse of process. That is a common occurrence. The fact that a court may disagree with the prosecution

decision does not entitle it to find an abuse of process. As the passage in Archbold indicates, the Court can reflect its view in the penalty to be imposed. 47. In our judgment, Kanetech, supported by the amicus, has come nowhere near showing that the Attorney General's decision to prosecute Kanetech but not the Minister or any other plumbers was so unreasonable that it offends the Court's sense of justice and propriety or would bring the criminal justice system into disrepute. (ii) Category 1- Not possible to have a fair trial 48. It is submitted that Kanetech could not receive a fair trial and that the proceedings should be stayed under Category 1 of the abuse of process jurisdiction. Mr Kane raised a number of points under this aspect supported in some instances by the amicus. We mean no disrespect to Mr Kane if we say that the following appeared to us to be the arguable points under this heading:- (i) It was unfair to charge Kanetech instead of Mr Kane personally. As a company, Kanetech was not eligible for legal aid whereas Mr Kane was. (ii) This had led to an inequality of arms. The prosecution was represented by an experienced Crown Advocate whereas Kanetech had to run a difficult abuse of process argument without legal representation, such that it was unable to articulate the issues properly or at all. (iii) The change in the charges at a late stage was unfair and had prejudiced Kanetech. (iv) There had been unreasonable delay in the matter such that Kanetech was prejudiced in its defence. (v) Kanetech had never been given the opportunity of making a witness statement in connection with the investigation. We will deal with each of these in turn. 49. As to (i), whilst there certainly appears to have been some confusion in the early stages of the prosecution in the Magistrate's Court and Mr Bolton appears to have suggested erroneously that Mr Kane should be the defendant, we do not think that any criticism can be made of the decision in due course to proceed only against Kanetech. It was clear that it was Kanetech which had undertaken the work and entered into the relevant contract. Mr Kane could therefore only be charged as a director under the provisions which allow a director to be charged in relation to the activities of a company. Mr Kane himself objected to being charged personally and said at the hearing on 14 th September, 2012, that the charges should be against the company, not him. Furthermore, Mourant Ozannes, who were then representing him, entered into correspondence urging the prosecution to proceed against the company rather than against Mr Kane personally. In due course the prosecution agreed. In those circumstances, it cannot be said now by Mr Kane that the prosecution acted unfairly in acceding to his contentions at that time. 50. As to (ii), although in general a company is not eligible for legal aid, it appears that exceptionally, the legal aid authorities appointed Advocate Bell and then Advocate Pearmain to represent Kanetech on legal aid. Neither the Magistrate nor we have been told the reasons why those Advocates did not continue to act but it appears that a difference of approach between Mr Kane and the Advocates may have arisen. In any event, the mere fact that a defendant is not legally represented does not mean that there cannot be a fair trial; it is a regular occurrence. Furthermore, any implied suggestion that the prosecution had chosen to prosecute Kanetech rather than Mr Kane because the former was not eligible for legal aid whereas the latter was, is completely untenable given that (i) Kanetech was the correct defendant as described in the preceding paragraph and (ii) it was at Mr Kane's urging (through his advocates) that the charges were

dropped against him and proceeded with only against Kanetech. 51. As to (iii) this Court agrees with the Magistrate that the amending of the charges in September 2013 did not cause the trial to be unfair. The charges as originally framed were incorrect in that they did not reflect the terms of the statute. The amended charges were foreshadowed at the time of the judgment of the Deputy Bailiff in June 2013 and reflected the correct position under the statute, namely that the offence was one of undertaking work without building permission rather than undertaking work without having applied for building permission. Kanetech had plenty of time to prepare its case to meet the amended charges and there was no change in the underlying facts relied upon by the prosecution. 52. As to (iv), there has been delay in this case, but much of it has been due to Kanetech's decision to appeal by way of case stated against the decision of the Magistrate in connection with the correct interpretation of the statute and subsequently as a result of its changes in legal representation. The authorities are clear that, even if there has been unjustifiable delay, a stay of proceedings is not usually granted unless a defendant can demonstrate that, due to delay, his ability to secure a fair trial is seriously compromised. As already discussed, we do not consider that that was the situation here. 53. As to (v), the submission misunderstands the position of a potential suspect. It is usually the case that a person under investigation is not given the opportunity of providing a witness statement. His evidence is obtained by an interview or voluntary statement under caution. Kanetech was being investigated in this case and therefore there can be no complaint that it was not invited to provide a witness statement. 54. In all the circumstances, we consider that the Magistrate was correct to find that Kanetech could have a fair trial. It follows that neither limb of the abuse of process jurisdiction is made out in this case and we do not therefore allow the appeal on that ground. Appeal against conviction 55. Advocate Cadin referred us to the observations of William Bailhache, Deputy Bailiff in *Graham v AG*

[2013] (1) JLR 91, the head note to which reads:- "(2) Under the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 the Royal Court had a wide discretion on an appeal from the Magistrate's Court. Article 20(3) provided that it could confirm, reverse or vary the decision of the Magistrate's Court, remit the matter to the Magistrate's Court or make such other order as it thought just. Although the Law gave no indication as to the basis on which the Royal Court should approach an appeal, it was clear that the Royal Court would interfere with the Magistrate's decision where there was a sufficiently serious procedural defect before the Magistrate or where the Magistrate had made a material error on an issue of law. Where an appeal simply concerned the evidence that had been given, if, on examining the transcripts, the Royal Court concluded that there was evidence before the Magistrate on which he could properly have reached the decision that he did, the Royal Court would not lightly interfere with the decision. Occasionally, the Royal Court would, however, interfere with the decision because it was uncomfortable with what had taken place at the Magistrate's Court." It is clear from paragraphs 18-20 of the judgment that, by the word "uncomfortable", the Court meant that it had some "lurking doubt" or "a reasoned and substantial unease" about the finding of guilt. 56. In this case, the amicus submits that

there were errors of law, there were procedural defects and there was insufficient evidence to convict. We shall consider each of these in turn.

- (i) Errors of law 57. In the appeal by way of case stated referred to at para 5 above, it was contended by Mr Kane on behalf of Kanetech that the "person" referred to in Article 33 was limited to the person who had to apply for the building permission under Bye-law 10. This construction of the statute was rejected by the Deputy Bailiff. He held that it was not relevant whether the defendant to a charge under Article 33 could or could not make application himself for building permission. The offence was complete when he carried out work which required building permission when no such permission had been obtained. 58. Advocate Cadin submits that the Deputy Bailiff reached an erroneous conclusion of law and we should depart from his decision. We would summarise his arguments as follows:- (i) Bye-law 10 (set out at para 28 above) imposes the obligation to apply for building permission upon the person who "proposes to carry out building work". (emphasis added) (ii) Article 33(1) of the Planning Law provides in effect that a person who undertakes building work (in respect of which building permission is required) without building permission having been granted is guilty of an offence. It is an offence of strict liability and must therefore be narrowly construed. (iii) The person who proposes to carry out the work in accordance with Bye-Law 10 is, according to the natural meaning of the words, the owner of the property in question. A contractor does not propose the works. It cannot have been the intention of the legislature that a person who could not apply for a permit (because it related to someone else's property) could commit an offence under Article 33(1). (iv) Support for this interpretation was to be derived from Bye-law 16 which deals with retrospective applications. It provides as follows:- "16(1) This bye-law applies if building work to which these bye-laws apply has been carried out without a building permit. (2) The owner of the premises to which the building work relates:- (a) may make a written application to the Minister for a certificate under bye-law 17; or (b) must do so if required by the Minister." That provision clearly envisages that it is the owner of the premises who may or must make such an application. Advocate Cadin submitted that the Deputy Bailiff's interpretation would have the effect that, under a chain of sub-contracts, a number of persons could commit the offence but only the owner of the premises would have the power to avoid any liability by applying for retrospective permission. (v) Further support, he said, was obtained from Bye-law 15(2) which provides:- "(2) In the case of work mentioned in paragraph 1(a) building permission is to be taken to have been given by the Minister for the work to be carried out if, within 30 days of the completion of the work, a person registered under an appropriate approved scheme:-
- (a) gives the Minister, through the registering authority under the relevant approved scheme, a certificate or a notice that contains the information contained in paragraph (5); and
- (b) gives to the person who required the work to be carried out a copy of the certificate or notice." This is the provision which enabled members of OFTEC to carry out work for EES without the need for building permission. It means that an owner could choose to engage an OFTEC registered individual to carry out the works and to procure that OFTEC provides the

Minister with a certificate containing the requisite information, thereby avoiding the need for building permission with the accompanying cost. (vi) In summary, looking at the aim of the Bye-laws as a whole, it is the owner (as defined by the Planning Law) of the premises who has the sole obligation to apply for building permission and who commits an offence if the work is carried out without such permission. 59. This Court may not depart from one of its previous decisions unless satisfied that it is plainly wrong. Far from that being the case, we are satisfied that the decision of the Deputy Bailiff was plainly right. We would summarise our reasons briefly as follows:- (i) It is Article 33(1) which creates the offence in question and one must therefore have regard to the language of that provision. In our judgment, it could not be plainer. It provides that:- "A person who undertakes prescribed building works except with ... permission to do so granted by the Minister ... shall be guilty of an offence ..." The offence is therefore the undertaking of prescribed building work without building permission. The provision says nothing about who should apply. Advocate Cadin's submission requires one to read in words such as "(who should have applied for such permission)" after "a person" at the beginning of the paragraph. There is no justification for reading those words into the provision. (ii) The question then is who 'undertakes' building work? In our judgment, depending on the facts of a particular case, work may be undertaken by any one or more of the owner of the premises, a contractor or a sub-contractor. Let us take the conventional simple position where a house owner enters into a contract with a contractor (whether a plumber or otherwise) to carry out building work for which building permission is required. In our judgment the work is undertaken by the owner (because he has procured that it take place) and it is also undertaken by the contractor (because it is he who has carried it out). Both are therefore potentially guilty of an offence if building permission has not been obtained. On the facts of the present case, there were three possible defendants who could be said to have undertaken the necessary work; the owner, the Minister (through EES) and Kanetech. (iii) Advocate Cadin's construction would lead to startling results which cannot have been intended by the legislature. The aim of the requirement for building permission includes the need to ensure that appropriate standards for health, safety, building standards etc. are met. Yet, on Advocate Cadin's construction, a contractor who is fully aware that building permission is required for the relevant work and who knows that it has not been applied for (perhaps because of the ignorance of a frail householder) can proceed with impunity to carry it out without fear of prosecution. Conversely, the interpretation which we favour would mean that such a builder would alert the householder to the need for building permission and would say that he could not carry out the work until building permission was obtained as otherwise he would be committing an offence. 60. In our judgment, these arguments are sufficient to reject the submission put forward by Advocate Cadin (supported by Mr Kane) even if he is correct in his assertion that, under the Bye-laws, it is only the owner who may apply for building permission. There is simply no link between the identity of the person who should apply for building permission and the undertaking of that work without permission as envisaged in Article 33. 61. Nevertheless, we do not accept Advocate Cadin's premise that it is only the owner who may apply for building permission. In the first place, we consider that, for the

purposes of Bye-law 10, the contractor is also a person who 'proposes' to carry out building work. Secondly, we do not regard Bye-law 16 as being exhaustive, in the sense that it is stating that it is only the owner of premises who may apply for retrospective consent. Albeit not in the context of retrospective applications, it is of note that much of the argument in this case was to the effect that it was EES that should have applied for building permission, yet it is not the owner of any of the properties. Furthermore, the evidence before the Court was that, following the events surrounding this case, EES has changed its procedure and now does apply routinely for building permission itself. It does so not as owner but as the person who is proposing that the work be carried out. As to the argument based on Bye-law 15(2), we must confess to not having followed this. It does not seem to us that this can affect the proper construction of Article 33(1). 62. Advocate Cadin's second legal point was that a 'replacement' of a combustion appliance - as was the case in relation to all of these properties - was not work which required building permission. 63. The argument runs as follows:- (i) As described earlier, in order to be prescribed building work for the purposes of Article 33(1), there has to be the 'provision' or 'extension' of a combustion appliance. (ii) Assuming for the moment that a heating boiler is a combustion appliance, Advocate Cadin's point is that replacement of one boiler by a new one is not the 'provision' of a boiler. He points out that the purpose of including combustion appliances in the Bye-laws is that, as set out in Part 3 of Schedule 2, the Minister has to ensure that there is "adequate supply of air" (para 3.1) and "adequate provision for the discharge of products of combustion" (para 3.2). These matters would have been checked on first installation and would not need to be considered merely on a replacement. (iii) The word 'replacement' is referred to in a number of passages in the Bye-laws (e.g. 5A(2), 10(1)(b), 15(6)(h), 15(6)(i)(c), (d) and (g). However, none of these relates to 'combustion appliances'. (iv) The Minister's issued technical guidance does not make it clear that replacement of a combustion appliance requires building permission. (v) On any view, the position is ambiguous and therefore, this being a statute imposing criminal liability, the interpretation more favourable to a defendant should be chosen. 64. In our judgment, this submission is untenable. A contractor who installs a boiler has 'provided' that boiler whether the boiler is being installed for the first time or in replacement of another boiler. Quite apart from the natural meaning of the word 'provision', the consequences of Advocate Cadin's interpretation would be surprising. It would mean that once a house has a boiler, it may thereafter forever have new boilers installed without regard to any Bye-law standards from time to time even if they have changed dramatically from the standards which were in existence when the first boiler was originally installed. 65. In summary, we do not accept that the Magistrate made any errors of law. (ii) Procedural defects 66. Advocate Cadin submits that there were a number of defects in the procedure followed before the Magistrate such as should lead the Court to allow the appeal against conviction. In summary, he submits as follows:- (i) The charges were incorrectly worded. (ii) It was unfair to proceed against Kanetech rather than Mr Kane and it was also unfair to allow the charges to be amended in September 2013. (iii) Documents were wrongly admitted in evidence without compliance with the requirements of Article 65 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("the 2003 Law"). (iv) It was unfair to allow the

evidence adduced in the abuse of process hearing to stand as evidence in the trial. We shall take each of these in turn. 67. As to (i), each of the sixteen charges (as amended) was in the following form:- "The said Kanetech Limited, with having on a date unknown between 19th August 2010 and 30th June 2011 at premises known as ... acted in contravention of paragraph (1) of Article 33 of the Planning and Building (Jersey) Law 2002 by undertaking prescribed building work, namely the installation of a heating boiler, without permission to do so granted by the Minister in accordance with the Building Bye-laws (Jersey) Law 2007." 68. Advocate Cadin submits that this wording does not accurately reflect the offence. As discussed at paras 27 - 31 above, the effect of the Bye-laws is that the 'prescribed building work' relevant to this case is the 'provision' of a 'combustion appliance' (which is defined as a 'fixed heat producing appliance designed to burn solid fuel, oil or gas'). Thus instead of the expression, 'namely the installation of a heating boiler', the charge should have said something to the effect, 'the provision of a controlled service, namely a combustion appliance'. The 'installation of a heating boiler' was not 'prescribed building work'. 69. We do not accept that the wording of the charges was deficient. It charges the undertaking of prescribed building work without building permission, which is the essence of the offence under Article 33. It gives particulars of the prescribed building work as being 'the installation of a heating boiler'. This wording does not follow the exact wording of the Bye-laws, in that they refer to the provision of a combustion appliance, which is defined as a 'fixed heat producing appliance designed to burn solid fuel, oil or gas'. If one were being a perfectionist therefore, it might be that the charge should have inserted after the words 'prescribed building works' wording along the lines of 'namely the provision of a fixed heat producing appliance designed to burn solid fuel, oil or gas, namely a heating boiler'. But in our judgment there can be no doubt that the expression 'heating boiler' is a shorthand expression for 'a fixed heat producing appliance designed to burn solid fuel, oil or gas'. It is not suggested that there was any misunderstanding by any of the parties as to what was alleged. 70. As to (ii), we have already dealt with this argument when considering whether there was an abuse of process. We do not consider that there was anything unfair or procedurally wrong in allowing the prosecution to proceed against Kanetech instead of Mr Kane (as Mr Kane had urged) or in allowing the charges to be amended on 13th September, 2013, as described at paragraphs 17 and 19 above. 71. As to (iii), Article 65(1) of the 2003 Law provides as follows:- "65 Business etc. documents

- (1) Subject to paragraphs (3) and
- (4) a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which oral evidence would be admissible if the following conditions are satisfied -
 - (a) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and

- (b) the information contained in the document was supplied by a person, whether or not the maker of the statement, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.
- (2) Paragraph (1) applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it -
 - (a) in the course of a trade, business, profession or other occupation; or
 - (b) as the holder of a paid or unpaid office." 72. Article 66 goes on to provide that, even where a statement is admissible by virtue of Article 65, the judge may nevertheless exclude it if, having regard to all the circumstances of the case, he considers that it is in the interests of justice to do so. Article 66(2) gives examples of matters to which the judge may have regard in addressing that question. It provides that the court shall have regard:- "(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;
 - (b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;
 - (c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and
 - (d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused." 73. As can be seen, business records may only be admitted if the two conditions referred to in Article 65(1) are satisfied. Advocate Cadin submitted that the prosecution did not in this case prove that the conditions were satisfied. This required either that the witness in question should give evidence as to the satisfaction of the two conditions or, if a witness statement was to be relied upon, that the witness statement confirmed satisfaction of the two conditions. Save in respect of the witness statement of Mr Bolton, neither of these courses had been followed in the present case. 74. We were not referred to any passage in the transcript where there was formal proof to the effect that the conditions had been satisfied. The only witness statement to contain the appropriate declaration as to the conditions was that of Mr Bolton. However, he gave oral evidence and accordingly his witness statement was not given in evidence. He did not repeat the contents of the statement when giving evidence in that respect. None of the other witness statements which we have seen contained the appropriate declaration as to satisfaction of the conditions, nor did any of the other witnesses give oral evidence to this effect. However, Advocate Jowitt argued that this was not necessary. He referred to the case of AG v Bhojwani

- [2009] JRC 217 where Clyde-Smith, Commissioner, adopted the guidance given in the case of *R v Foxley*
- [1995] 2 Cr. App. R 523 which was concerned with the equivalent English provisions. Clyde-Smith Commissioner summarised the effect of the decision in *Foxley* as follows at paragraph 8 of his judgment:- "In that case, it was held that the purpose of sections 24 and 25 of the Criminal Justice Act 1988 was to enable a document to speak for itself and parliament's intention would be defeated if in every case the creator or keeper of a document or the supplier of the information had to be called. Parliament's intention had clearly been that the court could draw such inferences as it thought proper from the documents themselves and from the method or route by which the documents had been produced before the court." 75. The Commissioner quoted, at paragraph 11 of his judgment, an extract from the judgment of Roch LJ in *Foxley* to the following effect at:- "Thus, we return to what we consider to be the crucial issue: is it necessary to call the creator or the keeper of the document or can a court infer that the document is authentic from its provenance? The opinion that we have already expressed is that the law says that a court can infer the authenticity of a document from the nature of the document itself, its source and the method by which it has been brought before the court." 76. The documents relied upon in this case were clearly documents made at the relevant time and originated either from Kanetech itself, from boiler commissioners or from EES. They were produced by various witnesses, albeit without specific reference to the satisfaction of the two conditions. Having regard to the principle described in *Bhojwani*, we agree that the Magistrate was perfectly entitled to conclude that they were genuine and reliable and satisfied the conditions in Article 65. 77. As to (iv), Advocate Cadin submitted that it was unfair to allow the evidence adduced during the abuse of process hearing to stand as evidence in the trial. The defence may well have wished to ask questions of the witnesses which were not relevant to the abuse of process argument but would have been relevant at trial. 78. The difficulty with this submission is that Kanetech chose to absent itself from the trial. It therefore denied itself the opportunity of asking any questions of the witnesses or of demanding the recall of any witnesses whom the prosecution did not intend to call at trial. 79. The transcript shows that immediately after the Magistrate announced her decision to refuse a stay for abuse of process, Mr Kane applied for her to state a case for the Royal Court on the abuse point and for the trial to be adjourned. He objected strongly when the Magistrate refused that application on the basis that it would be open to Kanetech to take any point it wished on abuse of process in any appeal following conviction. 80. Advocate Jowitt then said that most of the evidence had been heard the previous day during the abuse of process hearing and he proposed simply to call further evidence to prove some documents. The Magistrate stated that she would be satisfied that he called the remainder of the evidence and if necessary ask witnesses to adopt their previous evidence. The prosecution then called Lisette Jones and after a few minutes Mr Kane announced that he was leaving despite being warned that the trial would continue if he chose to leave. 81. In those circumstances, it is impossible to conclude that any prejudice has been suffered by

the fact that the Magistrate allowed evidence heard in the abuse of process argument to stand as evidence in the trial and we therefore reject this ground. 82. Having said that, we believe that the correct procedure would be for all witnesses needed at trial to be called even where they have given evidence on an abuse of process argument. It would be open to the Magistrate to consider letting them simply reconfirm the evidence given during the abuse hearing if that were thought to be a fair and reasonable way of proceeding in the particular case, with the defence then having the opportunity to ask any questions they may think fit. Nevertheless, given the fact that Kanetech had absented itself from the trial, we repeat that we see no prejudice or unfairness caused by the procedure which was followed in this case. 83. In summary, we do not find that there are any procedural grounds for allowing this appeal against conviction. (iii) Insufficient evidence to convict 84. Mr Kane did not make submissions under this heading and it appears never to have been suggested by Kanetech that it did not install heating boilers at the sixteen addresses referred to in the charges. Nevertheless, Advocate Cadin, as amicus, submitted that there was insufficient evidence for the Magistrate to have concluded that the work which Kanetech undoubtedly did (and for which it was paid) consisted of the installation of heating boilers. 85. In briefest outline, the prosecution evidence consisted of the following documents and oral evidence:- (i) The oral evidence of Lisette Jones to the effect that the replacement of boilers became part of the scheme in 2010. (ii) The application by Kanetech to become an approved contractor shortly thereafter, with a document attached to the application headed 'oil firing boiler installations and commissioning accreditations and process' with the body of the document recording that 'Kanetech Limited, in partnership with Romerils Jersey and Grant UK, guarantee to install and commission all high-condensing boilers oil firing boilers' (sic). (iii) The invoices submitted by Kanetech. These did not refer to any property by name but merely contained a reference number such as 'HES 421'. Oral evidence was given that, by reference to the internal records of the Department, this reference could be linked to a specified property, thus showing that Kanetech had invoiced for work carried out at each of the sixteen properties and had been paid for that work, albeit that the nature of the work was not identified. (iv) A letter from Kanetech received by EES on 8 th March, 2011, enclosing 'boiler commissioning reports' for the six properties covered by charges 10, 11, 13, 14, 15 and 16. The letter went on to say that Kanetech was still waiting reports for the properties relating to charges 8, 9 and 12. Those commissioning reports were produced in evidence, supported by witness statements which were read out from the plumbers who provided them. (v) An application form to EES completed by the householder in respect of charge 12 making it clear that what she was applying for was the replacement of an oil fired boiler. (vi) The evidence of Mr Roscouet, the director of Building Control, that the OFTEC exemption was related to the installation of oil fired combustion appliances. 86. Advocate Cadin submitted that, because the invoices did not specify the work which had been done and therefore did not refer to the installation of heating boilers, there was insufficient evidence for the Magistrate to conclude that that was indeed the work which had been done. It was only if she was satisfied that that was the work which had been undertaken that she could find

that it was prescribed building work and therefore required building permission. 87. We do not agree with this submission. The invoices have to be considered against the general background as described by the witnesses and in the light of Kanetech's application to become an approved contractor, which referred specifically to the installation of oil fired boilers. Furthermore, in relation to the charges where there was a commissioning report (charges 10 - 11 and 13 -16) there was clear evidence that the work which Kanetech had done was indeed the installation of oil fired boilers. The statement that reports would also be forthcoming for the properties in charges 8, 9 and 12 was supportive of the fact that that the installation of boilers was also the work being undertaken at those properties. In relation to charge 12, there was concrete support in the form of the application from the householder which referred specifically to the fact that she wished EES to procure the replacement of an oil fired boiler. 88. That leaves charges 1 - 7. In our judgment, given the overall evidence, the Magistrate was entitled to infer that the work done for these seven properties was of a similar nature and consisted of the installation of an oil fired boiler. Summary 89. In conclusion, we find that (i) the Magistrate was perfectly entitled to conclude that there was no abuse of process; (ii) there were no procedural defects which gave rise to unfairness or a sense of unease about the conviction; and (iii) there was sufficient evidence upon which the Magistrate could properly conclude that Kanetech was guilty of the offences charged. We therefore dismiss the appeal against conviction. Appeal against sentence 90. We have already held that the decision to prosecute was not so unreasonable as to bring into play the Court's jurisdiction to prevent an abuse of its process. Nevertheless, there are a number of reasons in support of the view that it was not necessarily in the public interest to prosecute Kanetech in this case. We would summarise them as follows:- (i) EES was in charge of the scheme. It effectively took over from the householder once an application from a householder had been approved. It might reasonably be said therefore that the primary or initial responsibility for ensuring that building permission was obtained lay with EES. (ii) It was of course open to EES to agree that the contractor should undertake this responsibility and it is true that, under the terms of the Schedule of Works, responsibility for obtaining permission was stated to be that of the contractor. However, this short provision was in the middle of a 66 page document and furthermore the wording used was not entirely clear in that it did not specifically refer to 'building permit' or 'building permission'. There is no evidence that, prior to Kanetech undertaking the work, anyone at EES drew Kanetech's specific attention to the obligation which it had assumed in this respect; EES simply relied on Kanetech having read the document thoroughly and understood it. (iii) It appears that other plumbers were also guilty of not obtaining the necessary building permission under the scheme, yet they were not prosecuted. (iv) EES required a commissioning report to the effect that the work had been completed by the contractor before it could be paid. (v) More than this, EES instructed its own expert, Mr Le Lay to inspect the work undertaken by Kanetech (and presumably others) in order to ensure that it was of appropriate standard and that it complied with the requirements of the Bye-laws. (vi) It follows that not only was EES aware the work had been done and could have ascertained from the Department's records that

no building permission had been obtained, but it also knew that the work had been done to the relevant standard and complied with the Bye-laws. The requirement to obtain building permission is largely to ensure that the necessary building standards are adhered to. In a normal situation, where building permission is not applied for when it should be, there can be no comfort that the work has been done to the relevant standard. That was not the position here. EES knew that the work had been done to the relevant standard and no further objective would be achieved by requiring building permission at that stage. (vii) In May 2011, the Department wrote to a number of plumbers drawing attention to the fact that building permission was required. The evidence from Mr Roscouet, director of Building Control, was that he subsequently advised Mr Kane that Kanetech could apply for retrospective consent but that Mr Kane refused to do so in a somewhat abrupt manner. In many respects he has undoubtedly been his own worst enemy. Nevertheless, for the reasons already mentioned, EES knew that the work had been carried out to the necessary standard in compliance with the Bye-laws. (viii) EES has since changed the arrangement so that it now obtains building permission rather than leaving it to the contractor. (ix) All the work had been undertaken by Kanetech without applying for building permission before the issue was drawn to its attention in the May 2011 letter. 91. We have of course considered the reasons in favour of the prosecution as put forward by Advocate Jowitt and summarised at paragraph 45 above. Nevertheless, we can understand Mr Kane's sense of grievance and we consider that the arguments against prosecuting Kanetech in the particular circumstances of this case materially outweighed those in favour. 92. As Advocate Jowitt accepted, in accordance with the passage from Archbold quoted at para 34 above, where the Court feels that a prosecution should not have been brought, it can reflect this in the penalty. In our judgment, that is the situation here. We consider that our view of the prosecution should be reflected by allowing the appeal against sentence. We quash the fines and substitute an absolute discharge in respect of each charge. We also quash the order for payment of costs in the sum of £5,000. Authorities Planning and Building (Jersey) Law 2002. Building Bye-laws (Jersey) 2007. Kanetech-v-AG

[2013] JRC 121 . Kanetech-v-AG

[2014] JRC 006. Warren v AG

[2011] JLR 424 . Archbold Criminal Pleading, Evidence and Practice Edition 2014. Graham v AG

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[2009] JRC 217 . R v Foxley [1995] 2 Cr. App. R 523. Page Last Updated: 27 Sep 2016 BAILII:
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