

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2018-404-2667  
[2019] NZHC 1599**

UNDER the Animal Welfare Act 1999

IN THE MATTER of an appeal against a Decision of the District Court

BETWEEN JANINE ANN WALLACE and BARBARA GLOVER  
Appellants

AND THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS AUCKLAND (SPCA AUCKLAND)  
Respondent

Hearing: 21 May 2019

Appearances: M Ryan for Appellant  
E T Fletcher and Y H Olsen for Respondent

Judgment: 10 July 2019

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**JUDGMENT OF WALKER J**

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*This judgment was delivered by me on 10 July 2019 at 4.00 pm  
Pursuant to Rule 11.5 High Court Rules*

*Registrar/Deputy Registrar*

## **Introduction**

[1] This is an appeal from a decision of Judge McGuire in the District Court declining an application to stay or adjourn proceedings for disposal orders under the Animal Welfare Act 1999 (the Act). The appellants, Ms Wallace and Ms Glover, contend that a stay or adjournment pending resolution of related criminal proceedings is necessary to avoid impinging fair trial rights. Although the application in the District Court was styled as an application for stay, it is common ground that it was, in effect, an adjournment application.<sup>1</sup>

## **Approach to this appeal**

[2] The refusal to adjourn the disposal order proceeding was an exercise of discretion. Ms Wallace and Ms Glover must therefore persuade me that there was an error of law or principle or the Judge took into account irrelevant considerations, failed to take into account a relevant consideration or was plainly wrong.<sup>2</sup> The suggested error relied on by Ms Wallace and Ms Glover is characterised as the finding that s136A of the Act was a justified limitation on their fair trial rights.

## **Background**

[3] The respondent, the Royal New Zealand Society for the Prevention of Cruelty to Animals (the SPCA), is an approved organisation under the Act and responsible for prosecutions. On 18 May 2018, the SPCA seized six German Shepherd dogs from a property of Ms Wallace and her mother, Ms Glover. On 23 August 2018, the SPCA filed a Notice of Application for Disposal Orders under the Act. The application seeks authority to sell, rehome or, as a last resort, euthanise the dogs. In the event the dogs are sold, the proceeds of sale are to be held by the SPCA after deduction of the cost of care and sale and the balance paid to the owners.

[4] Ms Wallace and Ms Glover filed a notice of opposition contending that they had not failed to meet their obligations as owners and the dogs were in excellent health. Ms Wallace made a supporting affidavit. Mr Ryan, counsel for Ms Wallace and

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<sup>1</sup> The relief sought in the Notice of Appeal dated 28 November 2018 is adjournment pending determination of the criminal charges.

<sup>2</sup> *K v B* [2010] NZSC 112; [2011] 2 NZLR 1.

Ms Glover, characterises this affidavit as deliberately pithy because of the shadow of potential criminal proceedings.

[5] On 2 November 2018, the SPCA laid criminal charges against Ms Wallace and Ms Glover for animal welfare offences under the Act. These included charges relating to the six German Shepherds, but also charges relating to other dogs not the subject of this appeal. The SPCA also filed a notice to cross-examine Ms Wallace.

[6] A hearing date of 28 November 2018 was allocated. On 22 November, Ms Wallace and Ms Glover applied to stay the hearing until conclusion of the criminal case. The following day, the SPCA filed a memorandum in opposition and withdrew its notice for cross-examination. It withdrew the notice for pragmatic reasons in the interests of progressing the matter without delay. It also opposed the application on the broader ground that the very purpose of the disposal order process would be defeated if disposal order applications had to wait until conclusion of a criminal proceeding.

[7] The application for stay was heard as a preliminary argument on 28 November 2018. Although dismissed by the District Court, the argument took up all available hearing time. The practical effect was a de facto adjournment. It is unclear to me whether, subject to this judgment, the disposal proceeding may still be scheduled to be heard before the prosecution given an anticipated resolution date in 2020.<sup>3</sup> Ms Wallace and Ms Glover now appeal the adjournment refusal.

## **Issues**

[8] Section 136A of the Act reads:<sup>4</sup>

**136A Disposal of animals seized or taken into custody prior to commencement or determination of proceedings**

(1) This section applies if—

(a) 1 or more animals are seized by a constable or an inspector, under the authority of a search warrant issued under section

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<sup>3</sup> The appellants' written submission seeks that the application for disposal order should be adjourned pending determination of the criminal proceedings.

<sup>4</sup> This citation does not include amendments not yet in force in the Animal Welfare Amendment Act (No. 2) 2015.

131, or are taken into possession by an inspector under section 127 or a constable under section 137(1); and

- (b) either—
  - (i) proceedings for an offence involving that animal or those animals—
    - (A) have been commenced but not yet determined; or
    - (B) have not yet been commenced but are intended to be commenced within a reasonable period; or
  - (ii) the owner of that animal or those animals cannot be located.
- (2) If this section applies, the District Court, on its own motion, or on an application by a constable or an inspector, may make an order authorising—
  - (a) the sale of the animal or animals; or
  - (b) the placement of the animal or animals with another person; or
  - (c) the destruction or other disposal of the animal or animals; or
  - (d) the dehorning or performance of other surgical procedures on the animal or animals.
- (3) The District Court—
  - (a) must, before making an order under subsection (2), give the owner of the animal or animals, if known and able to be contacted, an opportunity to be heard; and
  - (b) may make an order under subsection (2) if it is satisfied that there are good reasons for making that order; and
  - (c) may, when making the order, impose conditions (whether relating to the payment of any security holder in the animal or animals or otherwise).
- (4) In determining whether to make any order referred to in subsection (2), the court must have regard to the following matters:
  - (a) whether the owner of the animal or animals has been identified, and if not, the steps that have been taken to identify and contact that person;
  - (b) the number of animals involved;
  - (c) whether the animal or animals are being kept for economic purposes or for companionship;

- (d) the cost of continuing to hold the animal or animals:
  - (e) the physical state of the animal or animals:
  - (f) whether it is reasonable or practicable for the animal or animals to be placed elsewhere:
  - (g) whether it is reasonable or practicable for the Ministry or an approved organisation to retain possession of and care for the animal or animals until the determination of the proceedings relating to the animal or animals:
  - (h) whether any person will suffer material or other loss, and the extent of that loss, if the animal or animals are sold:
  - (i) any other matters the court considers relevant.
- (5) If an animal is sold under the authority of an order under subsection (2)(a), the proceeds of sale (if any) must be held by the Ministry or an approved organisation (after deducting (in order) the costs of sale, any sums required to be paid to a security holder or any other person under a condition of the order for sale, and any costs incurred by the Crown or approved organisation in caring for the animal or animals or providing veterinary treatment to that animal or those animals).
- (6) The Ministry or approved organisation referred to in subsection (5) must, unless the proceeds of sale are forfeited to the Crown under section 172(1) or the owner of the animal is unknown or cannot be contacted, pay the proceeds of sale to the owner as soon as practicable—
- (a) after the determination of the proceedings for an offence involving that animal or those animals; or
  - (b) after a decision is taken not to commence any such proceedings.

[9] Materially for the purposes of this appeal, the Court must give the owner of the animals an opportunity to be heard before making any order and s 136A(4) sets out mandatory criteria for determining whether to make an order for disposal. The non-hierarchical criteria include:

- (a) the cost of continuing to hold the animal or animals (s 136A(4)(d));
- (b) the physical state of the animals (s 136A(4)(e));
- (c) whether it is reasonable or practicable for the Ministry or an approved organisation (such as the SPCA) to retain possession of and care for the

animal or animals until the determination of the proceedings relating to the animal or animals (s 136A(4)(g)).

[10] Most significantly, the disposal procedure is available where the owner of the animals cannot be located, or if proceedings for an offence involving the animals has been commenced or is intended to be commenced within a reasonable period.<sup>5</sup>

[11] On the plain wording of the text therefore, including that of the mandatory criteria, the section contemplates a disposal order being made before the determination of criminal proceedings. The issue is whether there is any error of law in Judge McGuire's determination that the civil disposal proceeding need not await the outcome of the prosecution in order to preserve fair trial rights.

### **Arguments**

[12] Mr Ryan contends that there is an inherent tension between these provisions in the Act and the right to a fair trial under s 25(d) and s 27(3) of the New Zealand Bill of Rights Act 1990. He relies on the decision of Asher J in *Commissioner of Police v Burgess*,<sup>6</sup> although that case involves the different context of the compulsory examination procedure of the Criminal Proceeds (Recovery) Act 2009 (CPRA). He draws an analogy between the disposal procedure in the Act and the forfeiture order regime under the CPRA, because evidence provided by the owner in opposition to a disposal application can be used, without restriction, in the impending criminal proceedings. He maintains that this tension is not moot merely because an affidavit has already been filed and the notice to cross-examine withdrawn.

[13] Mr Ryan adds that Ms Wallace wishes to expand her evidence at the hearing as to the value of the bloodlines of the dogs, but fears that doing so will open her up to cross-examination with consequent impact on the criminal prosecution. He notes that Ms Wallace has not filed any affidavit evidence and suggests that this is because of the fair trial issues which are engaged.

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<sup>5</sup> Animal Welfare Act 1999, s 136A(1)(b).

<sup>6</sup> *Commissioner of Police v Burgess* [2011] 2 NZLR 703 (HC).

[14] Mr Fletcher for the SPCA, submits that the withdrawal of the notice to cross-examine Ms Wallace answers the concern about fair trial rights in the specific circumstances of this case. In short, because Ms Wallace elected to file an affidavit and because the SPCA withdrew its notice to cross-examine, there is no further impact on the fairness of the criminal proceedings. On the broader point, Mr Fletcher submits that the legislature specifically addressed and resolved the tension between the disposal order procedure and subsequent criminal proceedings, as evidenced by the clear wording in s 136A. He says this approach is supported by the principle that fair trial rights are not absolute and may be subject to justified limitations, pursuant to s 5 New Zealand Bill of Rights Act 1990.

[15] Both parties draw assistance from the forfeiture order regime under the CPRA, although they emphasise different elements. The leading case is *Commissioner of Police v Wei* where the Court of Appeal discussed the approach to be taken where civil actions to recover the proceeds of crime overlap with criminal proceedings.<sup>7</sup> Similar arguments were made in that case, namely that “giving evidence and being cross-examined in the civil matter could assist the police and prosecution in relation to the investigation and prosecution of the criminal charges against them.”<sup>8</sup>

[16] In the civil forfeiture regime under the CPRA, the Commissioner of Police must satisfy the Court on the balance of probabilities that the property at issue is tainted property in terms of the CPRA. Tainted property is defined as property that has, wholly or in part, been acquired as a result of significant criminal activity or directly or indirectly derived from significant criminal activity.<sup>9</sup> In the case of a profit forfeiture order, the Commissioner must satisfy the Court that the respondent unlawfully benefited from significant criminal activity and has an interest in property.<sup>10</sup>

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<sup>7</sup> *Commissioner of Police v Wei* [2012] NZCA 279.

<sup>8</sup> At [7].

<sup>9</sup> Criminal Proceeds (Recovery) Act 2009, s 5.

<sup>10</sup> Criminal Proceeds (Recovery) Act 2009, s 55(1).

[17] The Court of Appeal set out several statements of principle in *Wei*:<sup>11</sup>

- (a) There is nothing in the CPRA that requires priority be given to the civil proceedings over criminal trials;
- (b) Equally, there is no rule that civil proceedings must be adjourned if related criminal proceedings are pending;
- (c) Each case is fact specific and calls for a balancing exercise;
- (d) Where the prosecuting agency is, in effect, the same party as the civil plaintiff, the considerations of entitlement to pursue the civil claim without delay are substantially diluted;
- (e) The CPRA is silent as to Parliament's intention as to which proceedings should go first;
- (f) The purpose of the civil forfeiture regime is to reduce the ability of criminals and their associates to continue to expand their criminal enterprise;
- (g) An essential question is whether waiting for criminal charges to be determined before addressing the forfeiture application impedes Parliament's legislative intention.

[18] In my view, there is likely to be considerable overlap in the evidence and the subject matter of civil forfeiture applications under the CPRA and the related criminal proceedings. For example, the question of whether the defendant has engaged in significant criminal activity is also the central issue in the criminal trial. In contrast, a disposal order application in the animal welfare jurisdiction does not present the same degree of overlap. The mandatory considerations in s 136A(4) do not necessarily require the Court to take a view on the original reasons for uplifting the animals, although it must have regard to any other matters it considers relevant. In this regard,

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<sup>11</sup> *Commissioner of Police v Wei* [2012] NZCA 279 at [40]-[47].

I consider the requirement to take into account the physical state of the animals refers to the state of the animals at the time of determining the application, not, as here, over a year ago when the animals were uplifted.

### **Analysis**

[19] In my judgment, the most instructive guidance in *Commissioner of Police v Wei* is the following statement:<sup>12</sup>

In our consideration of the appeals, we keep ourselves firmly grounded in the nature of the decision under appeal in each case, namely a decision by a Judge about the time at which an application should be heard. This is a discretionary decision tailored to the facts of each case. It requires the Judge to undertake a balancing exercise, assessing the interests of each party, to reach a conclusion as to where the interests of justice lie.

[20] I accept that withdrawal of the notice to cross-examine means that there is no threat to the fair trial rights of Ms Wallace in the circumstances of this case. If the risk was a real one, the better course would have been to address this at the time of filing the opposition. It was not, and Ms Wallace voluntarily filed an affidavit.

[21] I also consider that the additional evidence Ms Wallace wishes to adduce about the bloodlines of the dogs is of marginal, if any, relevance to the criminal prosecution. It is however a factor in the disposal proceeding because the mandatory factors in s 136A(4) of the Act include whether the animals are being kept for economic purposes or for companionship; and whether any person will suffer material or other loss, and the extent of that loss, if the animals are sold. It is also relevant that there is no apparent redress for Ms Wallace and Ms Glover in the event the dogs are sold, and their bloodlines are lost for breeding purposes.

[22] In my view, it is up to the Judge hearing the application to permit further evidence by affidavit. Similarly, it is better for the trial Judge to determine whether additional oral evidence might be given and limitations, if any, as to cross-examination. These matters are better addressed in a fact specific context rather than

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<sup>12</sup> *Commissioner of Police v Wei* [2012] NZCA 279 at [40], citing *O'Malley v Southern Lakes Helicopters Limited* HC Christchurch CP513/89; 4 December 1990.

trying to extract more generalised principles. I am mindful that appellate courts must be sensitive to the practical reality of control of the conduct of proceedings.<sup>13</sup>

[23] There are significant differences between the criminal proceeds jurisdiction and the animal welfare jurisdiction:

- (a) The prejudicial impact of delay in civil forfeiture proceedings is generally slight compared to the impact of delay in the animal welfare case;
- (b) Animals require active daily care in the form of behavioural enrichment and attention, whereas seized property merely requires storage;
- (c) Animal care costs are significant. The costs for the care of the German Shepherds is projected to be \$170,000 if the prosecution is not concluded until October 2020. Although these costs are hotly disputed, it is inevitable that there will be substantial costs for feeding, housing and potentially veterinary expenses, without any obvious recovery avenue for the SPCA in the event of a successful prosecution.<sup>14</sup>
- (d) The purpose and policy of the two regimes is obviously very different. While the CPRA is silent as to Parliament's intention as to which proceedings should go first, s 136A of the Act expressly contemplates the determination of disposal proceedings before the conclusion of related offence proceedings.
- (e) The mischief which s 136A seeks to overcome is the costs for agencies and the negative impacts for the animals if disposal proceedings had to wait for the criminal prosecution to conclude. This befits the purpose of the Act reflected in its long title "to reform the law relating to the

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<sup>13</sup> *Commissioner of Police v Wei* [2012] NZCA 279 at [6].

<sup>14</sup> Mr Ryan submits that costs could be recovered by the SPCA at the end of the civil hearing in the District Court. I do not consider that is possible or realistic for a charitable entity to try to recover actual costs in a separate proceeding. On the other hand, to preserve economic interests, it must be practically open to dog owners to meet agreed care costs while the dogs are in custody and thus provide an alternate basis for staying the disposal proceeding.

welfare of animals and the prevention of their ill-treatment; and, in particular to [among other things], recognise that animals are sentient”.

[24] Cross-checking with the legislative history of the introduction of s 136A confirms the purpose and intent behind the chosen language and supports my conclusion.<sup>15</sup> Section 136A of the Act was inserted on 1 October 2012 by s 196 of the Search and Surveillance Act 2012. Prior to that, a prosecuting authority did not have any statutory permission to sell, rehome or otherwise dispose of animals while criminal offence proceedings were on foot. The practical result of this was the prosecuting authority had to care for any animals seized until the proceedings concluded, which conceivably takes months, or even years if there were appeals.<sup>16</sup> If the owner was convicted, forfeiture could be obtained under s 172 of the Act. In the case of acquittal, the animal or animals would be returned to the owner.

[25] Mr Ryan submits that the disposal provisions under Part 4(6) of the Search and Surveillance Act 2012 apply to the disposal of the animals in this case and that there is a degree of inconsistency between the provisions. This submission can be disposed of briefly – the disposal rules in subpart 6 only apply to things seized under specified statutory powers and are subject to any other enactment.

### **Decision**

[26] It is clear to me that the text and purpose of s 136A supports a disposal application being heard before resolution of the related criminal proceedings. Indeed, depending on the circumstances of a particular case, waiting for criminal charges to be determined before addressing a disposal application may impede the legislative intention of the legislature by making s136A a redundant provision.

[27] Balancing the respective interests of the parties against the framework of s 136A of the Act, I conclude therefore that there is no error of law in Judge McGuire’s refusal to grant an adjournment. The appeal is dismissed.

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<sup>15</sup> Neil Wells (ed) *Animal Law in New Zealand* (online ed, Thomson Reuters) at 15.2; Ministry of Agriculture and Forestry *Departmental Report on the Animal Welfare Amendment Bill 2010* (30 March 2010) at 7.

<sup>16</sup> See *Summers v Attorney-General* HC Whangarei M53/02, 4 February 2003 at [62].

**Costs**

[28] I direct that the appellants are to pay costs of the appeal to the respondent on a 2B basis. If costs cannot be resolved by agreement, I direct:

- (a) The respondent to file a memorandum of no more than 3 pages within 21 days;
- (b) The appellants to file any responsive memorandum of no more than 3 pages within a further 14 days;
- (c) Any reply memorandum to be filed within a further 7 days.

[29] In that event, I will deal with the issue of costs on the papers.

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**Walker J**