

[3] In a reserved decision, Judge Maze held that the Council had unlawfully fettered its discretion by refusing to consider rehoming Chase instead of destruction.² She ordered the ownership of the dog to be transferred to Ms Carla-Jane Cleverley, a friend of Mr Vickers who had offered to take the dog.

[4] The Council now appeals that decision on various grounds.

Parties to the appeal

[5] Mr Vickers did not instruct his solicitors in relation to the appeal and they sought leave to withdraw, which was granted. In order that the appeal be fully argued, this Court appointed Mr Mackenzie as counsel to assist. In that role, as he explained, he was to “assume any arguments for Mr Vickers” but also “to bring any relevant issues and arguments before the Court”.

[6] The constructive and collaborative approach adopted by counsel for the appellant, Mr Coleman, and counsel to assist, Mr Mackenzie, has clarified and refined the issues on appeal. Indeed, they have reached a common view, which I accept, on the errors that were made by the Council which resulted in errors in the District Court’s judgment, and on how the matter should be progressed from this point forward so a decision is made in accordance with the Act.

Background

[7] Mr Vickers acquired Chase on 30 May 2014. At that time Chase had already been classified as a menacing dog under s 33C(1) of the Act by the Council. During his period of ownership, Mr Vickers was issued with multiple infringement notices for failing to keep the dog under control and for failing to comply with the obligations which arose under the Act as a consequence of the menacing classification.

[8] On 27 July 2018, Chase was found wandering again and was impounded. Mr Vickers, however, uplifted Chase from the Council pound. Chase was then located on 2 August 2018 with Ms Cleverley and was seized on that date. The seizure was undertaken pursuant to s 33EC of the Act. That section authorises a dog control officer

² *Vickers v Waitaki District Council* [2018] NZDC 22258.

or dog ranger to seize and remove a dog where its owner fails to comply with the requirements imposed on the owner of a menacing dog.

[9] Having uplifted the dog under s 33EC, the provisions of s 71A(2) of the Act applied. This section provides:

- (2) A territorial authority may sell, destroy, or otherwise dispose of a dog seized by a dog control officer or dog ranger under ss 33EC, in any manner it thinks fit, -
 - (a) if –
 - (i) the territorial authority is not satisfied that the dog owner has demonstrated a willingness to comply with s 33E(1) or 33EB (as the case may be); and
 - (ii) the territorial authority has notified the owner of the dog in writing of its decision under subparagraph (i) and the right to appeal against it under section 71B; and
 - (iii) either:
 - (A) 7 days have elapsed and no appeal has been made; or
 - (B) an appeal has been made under section 71B and the District Court has not upheld it.

[10] The Council dog control officer concluded that Mr Vickers would not comply with the Act under s 71A(2)(a)(i) and wrote to Mr Vickers notifying him of that decision. The decision went on, however, to consider how Chase would be disposed of. It said that the Council had decided, in accordance with its policy, that Chase could not be sold or rehomed and that the Council “would seek to destroy Chase”. Mr Vickers appealed to the District Court, proposing that Chase not be destroyed, but be rehomed with Ms Cleverley.

The District Court decision

[11] Judge Maze allowed Mr Vickers’ appeal. She held that the Council’s policy to not rehome such dogs was ultra vires as it fettered a statutory discretion in s 71A(2) of the Act. She said the appeal could be allowed on that basis alone.

[12] However, the Judge also went on to consider whether Chase should be rehomed to Ms Cleverley. She held that there was “no clear evidence that [Chase] was wandering while under Ms Cleverley’s control” or that Ms Cleverley “connived with or conspired” with Mr Vickers for the release of Chase into his control or for the removal of Chase from the pound.³ Instead she accepted Ms Cleverley’s evidence that she was ready, willing and able to meet the obligations arising from Chase’s categorisation as a menacing dog.⁴

[13] Judge Maze recorded that “[t]he Act allows me two options, to confirm the decision by [the Council] or to allow the appeal and order the return of the dog to its owner”.⁵ She determined she could not order the return of the dog to its present owner as Mr Vickers was “not willing or able to meet his obligations”. However, she also held she could not “confirm the decision of [the Council] given the factual findings from the available evidence, and the fact the decision purported to be communicated in the letter of 6 August was not a proper exercise of discretion”.⁶ She therefore allowed the appeal and ordered that the ownership of the dog be transferred to Ms Cleverley.

Events since the appeal

[14] There is a footnote to that chronology of events. In updating evidence filed by the Council, the Court was advised that a Waimate District Council animal control officer received a complaint about a dog wandering on Dixon Street, Waimate, on or about 8 May 2019. Mr Vickers was located in a nearby property and confirmed that the dog in question was Chase. He said that Chase had been approved to live at the property with Ms Alana Keen, who is believed to be Mr Vickers’ current partner.

[15] Two months later, on or about 8 July 2019, the same Waimate District Council dog control officer received a complaint that a dog was wandering in a chicken pen in a street in Waimate. She went to the property and identified the dog as Chase. Chase

³ At [9]-[10].

⁴ At [11].

⁵ At [13].

⁶ At [13].

has subsequently been impounded by that Council. Subsequent enquiries show that Chase has not been registered to Ms Cleverley but is still registered to Mr Vickers.

The Act's procedure for disposing of a menacing dog

[16] The Act is expressly stated to have as one of its objects “to make better provision for the care and control of dogs” by, among other things, “making special provision in relation to dangerous dogs and menacing dogs”.⁷ It places express obligations on dog owners, which include to comply with the requirements of this Act.⁸

[17] A dog can be classified as a menacing dog under s 33A or s 33C of the Act. As a consequence of that classification, s 33E provides that the owner of the dog must not allow the dog to be at large in any public place unless it is muzzled. As already mentioned, where there is a failure to comply with s 33E, s 33EC allows a dog control officer or dog ranger to seize the dog and retain custody of it until either:

- (a) the dog control officer or dog ranger is satisfied that the person has demonstrated a willingness to comply with s 33E(1) or 33EB (as the case may be); or
- (b) the dog is disposed of under s 71A.

[18] Section 71A, set out in [9] above, involves a two-step process. The first is to make a decision under s 71A(2)(a)(i) as to whether the dog owner has “demonstrated a willingness to comply with s 33E(1)” (“the compliance decision”). The territorial authority must then notify the owner of the dog in writing of its compliance decision and the right to appeal against that decision under s 71B.⁹

[19] Only when either seven days have elapsed since the communication of the compliance decision and no appeal has been made, or an appeal has been made under s 71B and the District Court has not upheld it, can the territorial authority go on to the

⁷ Section 4.

⁸ Section 5.

⁹ Section 71A(2)(a)(ii).

second stage which is to make a decision as to whether to sell, destroy, or otherwise dispose of the dog (“the disposition decision”).

[20] In summary, therefore, the Council must first make a compliance decision which the owner can appeal. If an adverse decision is either not appealed or is upheld on appeal, then the territorial authority can make a disposition decision in relation to the dog.

[21] The right of appeal against the compliance decision is governed by s 71B. This allows the District Court two options:

- (a) to uphold the territorial authority’s decision; or
- (b) to order the return of the dog.

Application of the statutory procedure in the present case

[22] In the present case, as Mr Mackenzie submits, the Council erroneously made both a compliance decision and a disposition decision before a right of appeal could be exercised. That is, it advised its decision that Mr Vickers had not demonstrated a willingness to comply with s 33E(1)), at the same time as it advised the decision that it would seek to dispose of the dog, rather than rehome it, in accordance with the Council’s policy and bylaw.

[23] I accept, as Mr Mackenzie submits, that that was a premature exercise of the discretion involved in the disposition decision (leaving aside for now the question of whether there was an unlawful fetter on that discretion).

[24] As the Council had decided both that Mr Vickers was unsuitable, and that the dog should be destroyed before the right of appeal was exercised, it is unsurprising that Judge Maze’s decision dealt with both issues. However, the right of appeal could only relate to the compliance decision. That should have been the only issue before Judge Maze. That is consistent with the limited powers the Court has on reconsideration of that decision, being to uphold the Council’s decision or order the return of the dog. It is clear that the statutory provision does not provide a right of

appeal against the disposition decision, which could only be revisited on an application for judicial review.

[25] The District Court was therefore not seized of the question of how the dog should be disposed of and had no jurisdiction to make an order that the dog be transferred to the ownership of Ms Cleverley. To that extent, the appeal of the decision by the Council is allowed.

[26] However, I accept as Mr Mackenzie submits (and as the Council, in turn, concedes), that Judge Maze was correct in principle to say that a statutory discretion cannot be ousted by an inflexible policy, which is what she considered the Council had done by adopting a policy, which was then enacted in its bylaw, closing off the possibility of rehoming a menacing dog.¹⁰

[27] Finally, to the extent the District Court decision was an appeal of the Council's compliance decision, it clearly upheld it, with the Court recording the uncontested view that Mr Vickers was not willing or able to meet his obligations.¹¹ That is unsurprising as Mr Vickers never sought to appeal that issue.

The way forward

[28] As the Council's compliance decision has not been overturned on appeal, the requirements of s 71A(2)(a)(iii) have now been met. The Council is in a position where it can determine how to dispose of the dog.

[29] Such a decision can only be made in respect of a dog which has been seized by a dog control officer or dog ranger under s 33EC. At present it has been seized by the Waimate District Council. Either that Council must go through the two-stage process required under s 71A(2) of the Act, or if the dog is transferred to the control of the Waitaki District Council, then the Waitaki District Council can proceed to the second stage and make a disposition decision.

¹⁰ *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409.

¹¹ At [13].

[30] In that regard, it must exercise its statutory discretion to consider all options of disposing of the dog and it would be inappropriate of it to rule out, in advance, the options of rehoming or selling the dog in reliance on a policy or bylaw that prohibits those options. Beyond that I say no more about the decision to be made, as it must be made in full consideration of the facts that are available to the Council at that point.

Outcome

[31] The appeal is allowed in part. The District Court had no jurisdiction to order the rehoming of Chase to Ms Cleverley and that order is set aside. The other grounds of appeal fall away because the Court had no jurisdiction to consider those issues.

[32] In all the circumstances, it is appropriate that no order for costs is sought or made, particularly when Mr Vickers acknowledged his unsuitability and chose not to participate in this further appeal.

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