

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CIV-2018-092-003297
[2019] NZDC 24251**

BETWEEN

ROYAL SOCIETY FOR THE
PREVENTION OF CRUELY TO
ANIMALS AUCKLAND
(SPCA Auckland)
Applicant

AND

JANINE ANN WALLACE and
BARBARA GLOVER
Respondents

Hearing: 11 October 2019

Appearances: Mr Radich for the Applicant
The Respondents in Person

Judgment: 5 December 2019

RESERVED DECISION OF JUDGE C S BLACKIE

[1] This is a further application by Keven Richard Plowright, an inspector duly appointed under the provisions of the Animal Welfare Act 1999, on behalf of the Society for the Prevention of Cruelty to Animals Auckland (SPCA), seeking orders pursuant to s 136A of the Animal Welfare Act 1999 (the Act). The application is made in respect of six dogs which were seized under s 127(5) of the Act on 18 May 2018. The respondents oppose the application, denying that the applicant had the right to seize the dogs, nor do they have the right not to return the dogs to the respondents, who are their rightful owners.

[2] Further, the respondents contend that the proceedings were invalid on account of the fact that Kevin Richard Plowright had not been properly appointed under the provisions of the Animal Welfare Act. Or, more specifically, that the evidence of his

appointment under s 166 of the Act was invalid, as it was not signed by the Director-General. The certificate produced to the Court was created on Ministry of Primary Industries (MPI) letterhead and signed by Kate Littin, Manager of the Animal Welfare Team and “acting under delegated authority”.

[3] Before I traverse the facts of the case, this preliminary issue needs to be resolved.

[4] Turning firstly to the appointment of inspectors.

[5] Section 124 provides:

- (1) The Director-General may from time-to-time appoint persons employed in the State sector to be inspectors for the purposes of this Act.
- (2) The Minister may, from time to time, on the recommendation of an approved organisation appoint any person to be an inspector for the purposes of this Act.

[6] The certificate produced to the Court under s 166 certifies that Kevin Plowright was first appointed pursuant to s 124(2) of the Animal Welfare Act 1999. In other words, he was appointed by the Minister of Primary Industries and not by the Director-General, who is the Chief Executive Officer of the Ministry.

[7] As to evidence in proceedings, s 166 of the Animal Welfare Act provides:

- (1) In any proceedings for an **offence** against this Act, a certificate purporting to be signed by the Director-General and stating that a person named in the certificate is an inspector appointed under s 124 or an auxiliary officer appointed under s 125 –
 - (a) Is admissible in evidence; and
 - (b) Is, in the absence of proof to the contrary, sufficient evidence of the matter stated in it.

- (2) The production of a certificate for the purposes of this section, purporting to be signed by the Director-General is prima facie evidence of the certificate without proof of the signature of the person purporting to have signed it.
- (3) A certificate referred to in sub-section (1) is admissible in evidence only, if:
 - (a) At least 14 days before the hearing at which the certificate is tendered, a copy of that certificate is served by or on behalf of the prosecutor, or on the defendant or the defendant's agent or counsel, and that person is at the time informed in writing that the prosecutor does not propose to call the person who signed the certificate as a witness at the hearing, and
 - (b) The Court has not, on the application of the defendant, made not less than seven days before the hearing, or not less than four days before the hearing (or such lesser period as the Court in the special circumstance of the case thinks fit), that the certificate should not be admissible as evidence in the proceedings.
- (4) The Court must not make an order under sub-section (3)(b) unless the Court is satisfied that there is a reasonable doubt as to the accuracy or validity of the relevant certificate.

[8] The first point to note in respect of s 166 is that it applies in proceedings for an offence. In other words, it applies in the case of a prosecution under the provisions of the Animal Welfare Act.

[9] The second point is that it relates to certificates purporting to be signed by the Director-General. These proceedings are not criminal in nature, they are civil proceedings in relation to a disposal order under s 136A of the Animal Welfare Act. The certificate created by Ms Littin certifies that Mr Plowright was appointed an inspector pursuant to s 124(2), ie by the Minister. She purports to act under delegated authority.

[10] The certificate, which is dated 28 February 2018 (the hearing occurred on 11 October 2019) was clearly for a purpose for which s 128 applies.

128 – Production of Evidence of Appointment

[11] An inspector exercising the power of entry under s 127 must, at the time of the initial entry, and if request at any subsequent time produce:

- (a) Evidence of his or her appointment as Inspector and
- (b) Evidence of his or her authority.

[12] The Minister's authority under s 124 of the Animal Welfare Act, may be delegated under s 28 of the State Sector Act 1988. That section provides:

28 – Delegation of Functions or Powers of Appropriate Minister

- [13] (1) The appropriate Minister in relation to a department or departmental agency may, from time to time, either generally or particularly, delegate to the Chief Executive of that department or departmental agency or any of the Minister's functions and powers under this Act or any other Act, including functions or powers delegated to the Minister under this Act or any other Act.
- (2) Every delegation under this section shall be in writing.
- (3) No delegation under this section shall include the power to delegate under this section.
- (4) The power of the appropriate Minister to delegate under this section –
- (a) Is subject to any prohibitions, restrictions or conditions contained in any other Act in relation to the delegation of the Minister's functional powers; but
 - (b) Does not limit any power of delegation inferred on the Minister by any other Act.
- (5) Subject to any general or special directions given or conditions imposed by the appropriate Minister, the Chief Executive may exercise any functions or powers so delegated to the Chief Executive in the same manner and in the same effect as they had been conferred on the Chief Executive directly by this section and not by delegation.

- (6) Where the Chief Executive purports to act pursuant to any delegation under this section, the Chief Executive shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.
- {7) No delegation shall affect or prevent the exercise of any functional power by the appropriate Minister, nor shall any such delegation affect the responsibility of the appropriate Minister for the actions of any person directed under the delegation.

[14] However, s 28 only allows for the delegation to the Chief Executive (also titled Director-General) of MPI. For Ms Littin to certify appointment of an Animal Welfare Inspector under the Minister's delegated authority, the Chief Executive also needs to delegate their authority to her. This is done under s 41(1) and (1A) of the State Sector Act, which allows for a public service Chief Executive (such as that of MPI) to delegate, generally or particularly, any of their functions or powers to a public service employee.

[15] Like s 28 of the State Sector Act, s 41 requires the delegation to be in writing. However in the same manner it allows for the presumption, in the absence of proof to the contrary, that where a person purports to be acting under delegated authority, as Ms Littin does, it is done so properly.

[16] Having regard to the above, I find that for the purposes of determining these proceedings, Mr Plowright was appropriately appointed as from 13 November 2017 and continues to be appointed as an inspector under the Act until 13 November 2020.

[17] Because his role in these proceedings was to carry out an inspection of the defendants' property for the purposes of animal welfare and to present evidence before the Court in its civil jurisdiction, I do not consider it necessary that notice be served in the manner prescribed by s 166. Such service is only required in respect of criminal proceedings.

Preliminary Issue – High Court Appeal

[18] As previously indicated, orders are being sought by the applicant from the Court exercising its civil jurisdiction. This is not a criminal prosecution. It is important to make this distinction as the respondents have, in fact, been charged under the criminal provisions of the Animal Welfare Act 1999 and are due to stand trial before a jury in the latter part of 2020. There are different standards of proof. For the purposes of the application before me, the standard required is the balance of probabilities. In respect of a trial, the standard of proof is beyond reasonable doubt.

[19] The existence of the criminal proceedings have been a complicating factor in relation to the determination of the current application. Initially, the matter was set down for a hearing in November 2018, but the defendants sought an adjournment on the basis that if they had to give evidence in the civil proceedings, it could prejudice their rights under the Bill of Rights Act 1990 in respect of the criminal proceedings.

[20] On 29 November 2018, Judge C J McGuire, having heard submissions from counsel then acting for the respondents, determined that, nevertheless, the current application should proceed.

[21] The respondents appealed to the High Court against the decision of Judge McGuire

[22] The appeal was heard on 21 May 2019 and a reserved decision was delivered by Walker J on 10 July 2019. In dismissing the appeal, the Judge stated:

“[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 s 136A a redundant provision”.

[23] During the hearing before me, the respondents were no longer represented by counsel. Nevertheless, they were well prepared and were able to adequately cross-examine the applicant’s witnesses. For the purposes of their defence, they had already filed affidavits and were able to make submissions. I readily understood their

reluctance to give further oral evidence to the Court on account of the fact of an upcoming criminal trial.

[24] In reality, these proceedings fall to be determined largely on the evidence contained in the affidavits and submissions. Oral evidence was limited to cross-examination.

The Provisions of s 136A of the Animal Welfare Act 1999

[25] 136A Disposal of Animals Seized or Taken into Custody Prior to Commencement or Determination of Proceedings:

- (1) This section applies if:
 - (a) One or more animals are seized by a constable or an inspector, under the authority of a search warrant, issued under s 131, or are taken into possession by an inspector under s 127 or a constable under s 137(1); and
 - (b) Either –
 - (i) Proceedings for an offence involving an 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 the section applies, the District Court, on its own motion or an application by a constable or 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 de-horning or performance of other surgical procedures on the animal or animals.
- (3) The District Court –
- (a) Must, before making an order under s (2) give the owner of the animals, if known and able to be contacted, an opportunity to be heard; and
 - (b) May make an order under sub-section (2) if it is satisfied that there are good reasons for making that order; and
 - (c) May, while 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 an order referred to under sub-section (2), the Court must have regard to the following matters:
- (a) Whether the owner of the 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 animals to be placed elsewhere;
 - (g) Whether it is reasonable or practicable for the Ministry or an approved organisation to retain possession and care of the animal or animals until the determination of the proceedings relating to the animal or animals;
 - (h) Whether the 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 s (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 animals.
- (6) The Ministry or approved organisation referred to in sub-section (v) must, unless the proceeds of sale are forfeited to the Crown under s 172(1) or the owner of the animal is unknown or cannot be contacted, pay the proceeds of a sale to the owner as soon as practicable –
- (a) After the determination of the proceedings for an offence involving that animal or animals; or
 - (b) After a decision is taken not to commence any such proceedings.

The Previous Proceedings

[26] The respondents operate commercial kennels for the breeding and sale of German Shepherd dogs. The trading name of their kennels is Volkerson Kennels.

[27] The kennels are situated at 1478 Miranda Road, Mangatangi, a relatively large property of some 549 acres. Other animals kept on the property include cattle, deer, goats, sheep and horses. The kennels have been operating since the early 1960s.

[28] Whereas these proceedings relate to six dogs that were seized by the SPCA on 18 May 2018, there had, in fact, been earlier proceedings. A larger number of dogs have been seized, in October 2017, for which a Disposal Order was made in July 2018. The history of those proceedings has some bearing as to the outcome in these proceedings. The following is a summary:

(a) 28 July 2017

Following information received from a member of the public, the SPCA conducted an inspection of the Volkerson property. They were concerned about the condition of a number of dogs and issued a *AWS 130 instruction to prevent or mitigate suffering* to the respondent.

(b) 4 August 2017

A second inspection was conducted to see if sufficient improvements had been made. As the concerns had not been addressed, a further *AWS 130* was issued.

(c) 11 August 2017

A further inspection. Again, the SPCA were concerned that the animals were still not being cared for satisfactorily and issued a third *AWS 130*. It was noted that while the issuing of multiple notices was not ideal, it was consistent with the general approach to be patient with people trying to get them to meet their responsibilities. Endeavours are made to encourage compliance rather than the commencement of proceedings at the first opportunity.

(d) 12 October 2017

By this time, it was clear that the concerns had not been adequately addressed. There were still dogs confined to small areas without water and in filthy conditions. The view is formed that the respondents had far too many dogs to be able to look after them satisfactorily. Arrangements were made for removal.

(e) 13 October 2017

Powers under s 127(5) of the Act were invoked and 15 dogs that were considered most in need were taken into care. Two dogs were pregnant and later gave birth to litters of 11 and 10 puppies. Two did not survive.

(f) 17 January 2018

Proceedings were commenced in the District Court for a disposal order under s 136A. The proceedings were opposed, the respondents seeking that the dogs be returned.

(g) 12 July 2018

After a defended hearing, the application for a disposal order was granted by Judge Jane Lovell-Smith.

(h) The respondents filed an appeal against the decision of Judge Lovell-Smith. That appeal was later abandoned. Steps have been taken to dispose of the dogs in terms of the judgment.

The Second SPCA Seizure of Dogs – 18 May 2018

[29] The seizure of the six dogs that are subject to the present application took place while the earlier proceedings were still before the Court - indeed, less than a month before the defended hearing occurred on 12 June 2018. On 18 May 2018, Mr Plowright received a call from a Waikato animal management officer, Rhys Heatley, who provided information relating to a number of very distressed-sounding dogs barking from a bush block at the rear of the defendants' property. This barking had been reported by a concerned resident.

[30] Mr Plowright carried out an inspection of the respondents' property pursuant to the provisions of s 127(1) of the Act. After walking along a track in a bush-covered gully he located a number of dogs.

[31] The first dog sighted was a very thin female adult German Shepherd, chained to a tree. The chain was tangled around the tree, restricting movement of the dog. The area around the tree was heavily worn, indicating the dog had been there for several days. A water bowl was upside down, no water was available. The dog was very submissive, cowering, with its tail between its legs. It had a large and obvious area of inflamed skin on its rump. The infected area had lost much of its fur, making it very noticeable. The dog was without any form of shelter from the weather – it was mid-May, shortly before the onset of winter. The dog was identified by its VN number and micro-chip details as “**Tiffany**”.

[32] The second dog was similarly chained to a tree up the bank from the first dog. It was a six to seven-month-old female German Shepherd. Although it had access to water, that water was heavily discoloured. The ground around the chained area was

worn, indicating the dog had been tethered for some time. It was without shelter and exposed to the weather. It was identified as "**Princess**".

[33] The third dog was also a German Shepherd, tethered to a tree by a chain. Again, the area was worn, indicating that it had been there for some time. It had no water, an empty water bucket was tied to a tree. The dog was without shelter. It was identified as "**Tiana**".

[34] The fourth dog was a large, adult male, German Shepherd, tethered to a tree in the gully. Although it had access to water, it was without shelter. The ground within the chain area was worn. It was identified as "**Antonio**".

[35] The fifth dog was a female, located up a steep bush-clad bank. It had access to water. It was without shelter and left exposed. The ground area was worn. It was identified as "**Nelli**".

[36] The sixth dog was an adult German Shepherd, similarly chained to a tree. The area within the chain range was very worn, indicating it had been there for some time. It was without shelter and left exposed to the elements. It was shaking its head with one ear on an unusual angle, indicating an ear infection that was causing pain and discomfort. The dog was identified as "**Image**".

[37] Mr Plowright formed the view that the conditions in which the dogs were being kept fell far short of the standards required by the Act. He considered that the dogs were in need of urgent care, including veterinary care and, accordingly, they were seized and taken into the custody of the Auckland SPCA.

[38] On the afternoon of 18 May, the six dogs were seen and examined by Dr Douglas Dreyer, a veterinary surgeon registered with the New Zealand Veterinary Council. He gave evidence at the hearing. An examination of **Tiffany** revealed that she had a body score of 3/9 (*thin*) according to the Purina Body Score Chart. She had infection of the ear canal, was covered in mud, her fur was matted on torso and legs and on her dorsal lumbar area was a large fur mat partially covering an area of severe

alopecia, with partially healing superficial chronic dermatitis, typical of advanced chronic flea allergy dermatitis.

[39] When **Princess** was examined, it was noted that she also had a body score of *thin*, was covered in mud with matting of the fur. Both ear canals were covered with waxy exudate. The tail was x-rayed and a healed fracture noted of the proximal third of the tail, with gross displacement of the dorsal part of the tail, and arthritic changes in the vertebrae.

[40] **Tiana** was noted to have a body score of 3.5/9 (*bordering on thin*). The veterinarian was unable to examine her ear canals except under anaesthetic when it was noted there was slight waxy extrudate built up that had to be syringed and cleaned.

[41] **Image** had a body score of *thin*. Her coat was extensively covered in mud, with matting of the fur, especially the ventral chest area. Both external ear canals were exuding a pustular exudate,, which the veterinarian was unable to examine with an otoscope on account of extreme pain. Under anaesthesia it was noted that both ear canals had dried, yellow exudate around the entrance of the canals and that the wall of the ear canals were thickened and bleeding. The right canal was thickened and narrowed so much that not all the pustular debris could be removed safely on account of the possibility that the right tympanic membrane might be perforated.

[42] **Nelli** was also recorded as *thin*, with a coat dirty with mud and fur matted. She had a mild build-up of waxy exudate in both ear canals and mild folliculitis above the eyes.

[43] A physical examination of **Antonio** was not able to be performed on account of his aggressive nature. He had a body score bordering on *thin* and was also covered in mud. Under general anaesthetic it was noted he had waxy exudate in both ear canals.

[44] As a result of his examination, the veterinarian expressed the opinion that all six dogs were underweight, too thin, and all covered in mud with matting of the fur, which required them to be bathed and brushed. Also, in his opinion, **Tiffany** was

suffering from chronic flea allergy dermatitis, which was the result of an area of pruritic skin and which had a low-grade superficial dermatitis with thickening of the skin on the dorsal lumbar area. In his view this would have been obvious to a lay person and could well have been prevented or, if noticed in its early stages, treated with topical medication. The dog would have suffered chronic mild pain until treatment.

[45] In his opinion, **Image** was suffering from severe bilateral pustular otitis externa of both ear canals, especially the right ones, and this had been going on for a lengthy period of time, as seen by the narrowing of the ear canal due to inflammation and the scar tissue as a result of the chronicity of this condition. The condition would have been obvious to a lay person, who should have sought veterinary advice and treatment. The dog would have been suffering moderate pain and stress due to this ongoing condition.

[46] Both Mr Plowright and Dr Dreyer were cross-examined by the respondents. Mr Plowright rejected the contention that the tree canopy would have been adequate shelter against the weather. He also rejected the suggestion that the dogs were not dehydrated and that they were fit and well-muscled. Dr Dreyer said that he had considerable experience with German Shepherd dogs, he had been the veterinarian to the German Shepherd Club in South Africa. The fleas could have been detected much earlier. The matt and her fleas were responsible for the dermatitis.

Defence Case

[47] The respondents relied principally on the affidavits filed by Janine Ann Wallace and dated 17 September 2018 and 30 September 2019.

[48] Ms Wallace expressed her “extreme” concern over the actions taken by the SPCA. She and her mother (Barbara Glover) are experienced, conscientious dog breeders who had been treated with discourtesy and disrespect by the SPCA and its employees. The court proceedings have heightened their feelings of being persecuted without regard to their actions and integrity.

[49] Ms Wallace deposed that she and her mother operate a working dry-stock farm, where they primarily breed and raise cattle, deer, sheep and goats. They also have private kennels, which is not open to the public. While they breed and sell some dogs, it is not a profitable operation. The numbers fluctuate and the dogs are registered with the New Zealand Kennel Association.

[50] There were 50 German Shepherd dogs registered in 2017 - 2018. A number of these have already been surrendered and seized by the SPCA. There were currently 22 dogs remaining on the property.

[51] At the time of the inspections conducted by the SPCA, Ms Wallace did not believe that the dogs were kept in conditions which were in breach of the minimum standards set by the Animal Welfare (Dogs) Code of Welfare 2010. Ms Wallace disputed the need both for the dogs to have been seized by the SPCA on 13 October 2017 (the subject of earlier proceedings) and/or for the dogs to have been seized on 18 May 2018 (the current proceedings). As far as the current proceedings are concerned, each of the six dogs had its own kennel in the kennel complex. During the day, they were on light 2.47 metre chains, with a soft collar, had the natural shelter of the bush and were not exposed to the weather. The ground underfoot was soft, therefore ideal for German Shepherds to move around on. There were adequate buckets of water placed at the location and the dogs were not dehydrated. She was aware of the ear infection to **Image** and was gently massaging antibiotic and anti-inflammatory ear drops. The animals were in excellent health, athletic condition and were within the weight range according to German Shepherd breeding standards. They had good coats, which were not matted. If they were a little muddy, this was a result of their own fun.

[52] In her second affidavit - 30 September 2019, Ms Wallace's comments are largely on matters which pertain more particularly to the charges which have yet to be heard, the breeding and importation for breeding of the particular dogs, the attendance at dog shows, the value of the dogs and the lack of understanding by SPCA officers of the true facts relating to the breeding, care and maintenance of such dogs.

Discussion and Conclusions

[53] This is not the first application by the SPCA for orders pursuant to s 136A of the Animal Welfare Act in respect of the respondents. It follows on from and, to some extent, overlaps the earlier proceedings heard before Judge Lovell-Smith, about which she delivered a Judgment on 12 July 2018. These proceedings could, with an appropriate amendment and extension of time, have been incorporated into those proceedings and heard simultaneously.

[54] It can be inferred that the investigation into and the subsequent taking into care of the six further dogs, occurred at a time when the respondents were preparing for the earlier hearing and gathering evidence to present to the Court to try to show that they had sufficient housing and resources to care for all of the dogs in their possession. Mr Plowright pointed out his concern that these dogs were essentially being hidden. He could think of no other reason why they should have been kept in such remote and unsatisfactory conditions.

[55] The remoteness is obvious. The area of bush where the dogs were found by the inspector was 1.8 km distant from the respondents' house and kennels – as the crow flies, a greater distance across the terrain on foot or on quad bike.

[56] A number of photographs of the bush location were produced to the Court. These photographs clearly demonstrate extensive areas of completely bare terrain, ie devoid of any plant or vegetation within the chain distance from the tree to which the dog was secured. This contrasts significantly with the undergrowth in the bush beyond the chain's reach. The exposed soil that surrounds each tree where tethering occurred could not possibly be the result of casual or intermittent tethering. Although there are water buckets, either strapped to a tree or on the ground, not all, from the photographs, actually contained water. In one instance, the dog only has a bowl which is photographed in situ – empty and upside down. The canopy of the bush above the tethering area could only be said to provide limited shelter from the elements but almost zero protection from the cold.

[57] In effect, these proceedings are an extension of the application before Judge Lovell-Smith. She considered similar evidence, both by affidavit and oral testimony from a number of witnesses, including the respondents.

[58] Judge Lovell-Smith, in reviewing all the evidence before her, concluded:

“[138] I am satisfied beyond reasonable doubt that Mr Plowright’s overall findings, supported by the bundle of photographs and four visits to the property, together with receipt of the veterinary advice, are not able to be challenged by the respondents. I find that the explanations provided by the respondents are implausible and unacceptable. Despite four inspections, the SPCA was unable to establish the exact number of dogs on the property and their investigation was hindered by the respondents, who were not forthcoming with the information regarding the number of dogs. I also accept the evidence of inspector Reid.

[139] I am left in no doubt that the respondents’ property does not have suitable facilities to house the number of dogs in their care, that many of the dogs were tethered without shelter or water remain, despite the multiple notices that have been issued by the SPCA. The respondents accepted that the dogs tethered on short, one metre leads attached to a choke chain around their neck was unacceptable.

[140] Clearly, Ms Wallace and Ms Glover were disorganised, lacked insight and unable to comply with the instructions issued. There is no doubt that the dogs were not being cared for adequately. Further, I am satisfied beyond reasonable doubt that neither Ms Glover nor Ms Wallace have the ability nor the inclination to care for them properly if they were to be returned to them.

[59] I find that the circumstances in which the six dogs, the subject of this application, were similar, if not worse, than the circumstances that confronted Judge Lovell-Smith. I agree with the conclusions of Mr Plowright. There were six dogs chained to trees in a remote area of the respondents’ property. The sheer distance between the dwelling and the dogs would have made regular monitoring difficult and would significantly increase the potential risk of injury. There was no shelter provided and, therefore, all six dogs were exposed to the weather. By being chained to trees, there was the risk of entanglement around other trees within the chain range. Four of the six dogs were without water.

[60] When seen by the veterinary surgeon, it was noted that they were in thin (or bordering upon thin) condition, they were dirty with matted hair and several showed signs of pain and distress through ear infection and/or inflamed flea infested skin conditions. The respondents, despite their endeavour to persuade me to make findings

to the contrary, remain as disorganised and lacking in insight as was found by Judge Lovell-Smith. The overwhelming inference which I draw from the fact that the dogs were concealed in the bush, so far away from the respondents' home and kennel facilities, could only have been to ensure that they did not come to notice of the inspectors so as to fall within the earlier s 136A application.

[61] Having regard to the finding I make as to the conditions under which the six dogs were being kept, I must now determine whether to make an order pursuant to s 136A(2) of the Act and, in doing so, have regard to the matters raised in subsection (4). They are as follows:

- (a) Whether the owner of the animal or animals has been identified.

Both respondents have ownership of the animals, although Barbara Glover is recorded as the registered owner with the Council and with Dogs NZ.

- (b) The number of animals involved.

A total of six animals are the subject of this application.

- (c) Whether the animals are being kept for economic purposes or for companionship.

The animals are for breeding and commercial purposes. Ms Wallace told Mr Plowright that they operated as a private kennel and not open to the public, with no open times for public viewings. She and her family were dog breeders.

- (d) The cost of holding the animals:

It is estimated the cost to-date is approximately \$170,000. The applicant is a charitable entity and obviously ongoing costs are a major concern.

- (e) The physical state of the animals:

Clearly the animals were in a poor physical state, either thin or bordering on thin. A number were identified as suffering from ear

infections, another with flea infestation, another with a broken tail. They were kept in unsatisfactory conditions, including:

- (i) No or insufficient shelter
 - (ii) Insufficient access to water.
 - (iii) Prolonged chaining to trees in the bush, as is illustrated by the worn and bare nature of the bush floor.
 - (iv) The risk of entanglement with other bush vegetation.
 - (v) At a considerable distance (1.8 km) as the crow flies from which to be fed, watered, exercised and generally maintained.
 - (vi) Exposed to the weather. No property shelter
- (f) Whether it is reasonable or practicable for the animals to be placed elsewhere:

It is inappropriate for the animals to be returned to the respondents' property. It was and remains a high risk environment. The fact that these animals were and continued to be neglected during the course of the earlier proceedings before the Court cannot lead to any confidence that the respondents have the ability or inclination to provide adequate care.

- (g) Whether it is reasonable or practicable for the Ministry or an approved organisation to retain possession of and care for the animals until the determination of the proceedings relating to the animal or animals.

It is reasonable for the SPCA to retain possession of and care for the animals until they are placed with a foster carer. It is certainly not reasonable, or practicable, for the SPCA to continue to retain possession of and care of the animals, awaiting the outcome of the criminal proceedings.

Due to the costs involved in the applicants holding the animals in their temporary care, the long-term need will only be met by the animals being sold or re-homed.

- (h) Whether any person will suffer material or other loss, and the extent of the loss if the animals are sold.

It may well be that the respondents will suffer loss because they are not able to breed from the female dogs and on-sell. However, according to their affidavits, they do not make money from breeding. They assert that their kennels are not a profitable business. There is no evidence of loss.

[62] Like Judge Lovell-Smith in the previous proceedings, taking all matters into account, I am satisfied that there are good grounds for orders to be made under s 136A that the six dogs seized and retained from the respondents' property are sold or retained under s 136(2)(a) of the Act, subject to the following conditions:

- (a) That the proceeds of sale must (if any) be held by the applicant after deducting any costs incurred by the applicant in caring for the animals, providing them with veterinary assistance and the sale cost.
- (b) To pay the balance of the proceeds of sale (if any) to the owners after the determination of the proceedings for the offences involving the animals, or
- (i) A decision is taken not to proceed with the prosecution.
- (ii) The animals are placed with another person under s 136A(2)(b) of the Act, or
- (iii) The animals are destroyed under s 136A(2)(3)(c) of the Act, if the animals cannot be sold or rehomed within a reasonable period.

[63] In all likelihood, the costs incurred by the SPCA will greatly exceed what may be recovered from selling or rehoming all or any of the animals concerned. There may be a balance which the SPCA may seek to recover.

[64] The applicant is entitled to costs in these proceedings on the Civil Scale 2B. The applicant should submit a memorandum for costs within 21 days of the release of this decision. The respondents may reply to that memorandum within 21 days thereafter – of receipt.

[65] These are orders accordingly.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

C S Blackie
District Court Judge