IN THE DISTRICT COURT
AT OAMARU

I TE KŌTI-Ā-ROHE
KI TE OHA-A-MARU

CIV-2018-045-000045
[2018] NZDC 22258

BETWEEN	DANIEL LENARD VICKERS Appellant
AND	WAITAKI DISTRICT COUNCIL Respondent

Hearing: 24 October 2018

Appearances: L Laming for the Appellant
B Coleman for the Respondent

Judgment: 29 October 2018

RESERVED JUDGMENT OF JUDGE J E MAZE

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[1] This is an appeal by Daniel Vickers against the decision by Waitaki District Council (WDC) to destroy Mr Vickers' dog Chase.

[2] The uncontested evidence shows the following:

- Chase was classified as a menacing dog in 2013; and
- In 2014 Mr Vickers accumulated several infringements in relation to Chase which meant Mr Vickers was made a probationary dog owner for two years; and
- Chase was impounded by WDC for wandering in Oamaru in December 2017; and

- On 24 June 2018 WDC received a complaint that Chase had bitten a repossession agent attending the property next to his home address in Oamaru. I have no detail other than that, and the agent did not give evidence; and

- On 25 June 2018 WDC impounded Chase; and

- On 29 June 2018 WDC inspected the property of Carla-Jane Cleverley and released Chase into her care, having considered her property then to be secure and her to be competent to care for a menacing dog; and

- After Ms Cleverley took possession of Chase, Mr Vickers took Chase back and Chase was later found again to be wandering and impounded by WDC; and

- WDC informed Mr Vickers by letter dated 6 August 2018 that it was not satisfied that Mr Vickers had demonstrated a willingness to comply with s33E(1) and s33EB of the Dog Control Act (the Act), that the policy of the WDC did not allow re-homing or sale of a menacing dog, and advising of his rights of appeal; and

- Mr Vickers removed Chase from the pound without permission of WDC; and

- Chase has been re-impounded.

[3] There has since been an email communication to the Court asking that a certain factual allegation be brought to my attention. I have declined to receive the email as no single party has a right of audience except in ex parte applications. No party has the right to communicate with the Judge (whether by email, letter, phone call or in person) on a matter before the Court except in the presence of the opposing party. No evidence is available except by affidavit. No fresh affidavits have been filed, no leave has been sought to do so and no further applications have been filed and served. I

wish to make plain to both parties that this has occurred and that the decision has been reached without regard to that communication or allegation in any way.

The case for the appellant:

[4] Mr Vickers submits Ms Cleverley is a suitable person for re-homing, there has been no increase in the risk Chase presents to the public since 29 June 2018 (when WDC released Chase into the care of Ms Cleverley), re-homing is specifically one of the options which under s71A(2) WDC must consider, and Ms Cleverley is not responsible or accountable for his own irresponsible actions in relation to Chase.

The case for WDC:

[5] Ms Cleverley is not a suitable candidate for re-homing Chase and Chase presents a risk to public safety.

The letter of 6 August 2018:

[6] This letter cites WDC policy as a barrier to re-homing or sale of a menacing dog, but this is not expressed as anything more than policy. It is not a bylaw, nor is it an enactment in any form. Had such a policy had force of law it would have been pleaded as a complete barrier to Mr Vickers' submission, and it has not. Section 71(2) specifically grants a territorial authority the discretion as to three options, being sale, destruction or other disposition. WDC is therefore bound, on reaching a decision about Mr Vickers' willingness to comply with his obligations under s33E and 33EB, to exercise its discretion without fetter by policy and consider which of the options it wishes to take. It is obliged to take into account the protective nature of the legislation in relation to dangerous dogs and menacing dogs, but it must responsibly exercise that discretion. By automatically following fixed policy it has failed to exercise its discretion as a matter of law in relation to its obligations under s71A. I could therefore allow the appeal on that basis alone, but, in the circumstances, that is unlikely to provide an answer to the parties longer term and so I therefore continue to consider the merits of the appeal.

[7] The relevant questions are:

- What risk to public safety does Chase present and has it increased since 29 June 2018?
- To what extent can Ms Cleverley be held responsible for the events since 29 June 2018?
- Would release of Chase into the ownership of Ms Cleverley increase the risk to public safety?

[8] Mr Vickers accepts and does not challenge the classification of Chase as a menacing dog. That creates obligations upon him under s33E and s33EB of the Act. As part of s33E (1) and s33EB relate to neutering, and as that does not arise as an issue of concern on the evidence as filed, I must assume the concerns of WDC relate purely to s33E (1)(a) (keeping the dog secured and otherwise muzzled. Mr Vickers does not argue that he has failed in that duty repeatedly.

[9] The risks therefore presented to safety of the public by Chase seem to arise from his wandering and the one complaint that on 24 June 2018 he bit a person in Oamaru. As I have no direct evidence about that complaint and it was not seen as a barrier to releasing chase into Ms Cleverley's care on 29 June 2018, I must assume that the seriousness of that situation was assessed responsibly by WDC staff and it was seen to be at a low level. There is absolutely no evidence Chase has ever bitten anyone before or since that alleged biting. Mr Vickers plainly cannot shed any light on what occurred as he was not there. WDC received the complaint. The primary witness was the person making the complaint, but I have not been given that evidence. The only other factor bearing on risk analysis and assessment must be the continuation of wandering while in Mr Vickers' control. There is no clear evidence that he was wandering while under Ms Cleverley's control. As his wandering has never been linked to aggression except for the complaint of 24 June 2018, it is difficult to say that he presents any greater risk to public safety than he presented on 29 June 2018. At that point WDC did not consider it was appropriate to require destruction of the dog. Given nothing has happened increasing the risk to public safety since 29 June there cannot have been any increase in the risk to public safety.

[10] To what extent (if any) can Ms Cleverley be held responsible for Chase wandering or for Mr Vickers actions? Chase was not in her control or care on 24 June 2018. The evidence does not show Chase was allowed to wander when in her care

and control after 29 June 2018. There is no evidence 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. Staff members of WDC may express suspicion, and it may be that their suspicions have led to the police charging Ms Cleverley with receiving, but she has denied any involvement in taking Chase from the pound. Being charged and being convicted are two very different things. Our law presumes a person to be innocent until a charge is proven beyond reasonable doubt (see Wanhalla [2007] 2 NZLR 573). Mr Vickers remained the registered owner of Chase and irresponsibly he chose to exercise his ownership by taking the dog both from WDC pound and from Ms Cleverley, but that is not attributable to Ms Cleverley on the evidence placed before me. The suspicions expressed by WDC staff would be addressed simply by Ms Cleverley assuming ownership of, and therefore the obligations for Chase.

[11] Would release of Chase into the ownership and control of Ms Cleverley increase risk to public safety? Plainly Ms Cleverley is not accountable for the foolish actions of Mr Vickers. There is no evidence she participated beyond taking the dog back under her control after he was taken without permission from the pound (and she refers to the circumstances of that in her affidavit). There has been no increase in risk to safety established in relation to the conduct of Chase himself. Ms Cleverley has not demonstrated she is unwilling to meet the obligations arising from Chase's categorisation as a menacing dog. In fact to the contrary she has spelled out in her affidavit all she is ready willing and able to do. Her own problems in relation to Sharkie's wandering seems to have been resolved by the inspection of 29 June 2018, a matter which in fact shows her level of acceptance of responsibility.

[12] I therefore conclude that WDC had an obligation to consider re-homing Chase, given its decision to, in effect, re-home him on 29 June 2018. Since that date Chase has presented no increased risk to public safety, and the aims and objects of the Act can be expected to be satisfied if Chase becomes the property of Ms Cleverley. That step is necessary as Mr Vickers has accepted he had failed to meet his obligations to Chase and the public arising under the Act.

[13] The Act allows me two options, to confirm the decision by WDC or to allow the appeal and order the return of the dog to its owner. I cannot order the return of the

dog to its present owner as Mr Vickers is not willing or able to meet his obligations. I cannot confirm the decision of WDC 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. The order is therefore that the appeal is allowed, and that, upon the ownership of the dog being transferred to Ms Cleverley, Chase is to be released into her control.

J E Maze
District Court Judge