

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

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

**CRI-2023-404-000047
[2023] NZHC 1876**

BETWEEN TERRYMOANA PIVOTT
 Appellant

AND AUCKLAND COUNCIL
 Respondent

Hearing: On the papers

Counsel: M Büdler and H Croucher for the Appellant
 J Libbey and C Sleigh for the Respondent

Judgment: 19 July 2023

**JUDGMENT OF GORDON J
[As to costs]**

This judgment was delivered by me
on 19 July 2023 at 10 am

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
Public Defence Service, Manukau
Rice Speir, Auckland

[1] This is a judgment on an application by the respondent, Auckland Council (Council), for costs on an appeal brought by the appellant, Terry Moana Pivott, which was abandoned on the morning of the hearing.

[2] Terry Moana Pivott was found guilty in the District Court in her absence at a formal proof hearing on three charges arising out of the same incident pursuant to s 57(2) of the Dog Control Act 1996.¹ One of her two dogs, OJ, attacked another dog. Ms Pivott's second dog, MJ, also attacked that other dog as well as its owner. Judge Large in the District Court imposed fines, costs and ordered the destruction of OJ and MJ.

[3] Ms Pivott appealed her conviction and the order for the destruction of her two dogs. She was unrepresented until after the commencement of her appeal. Ms Pivott sought to adduce fresh evidence on appeal. The Council opposed the appeal and the application to admit fresh evidence. As a consequence of further disclosure made by the Council on the afternoon of Sunday 18 June 2023, the day before the hearing, Ms Pivott, having received legal advice as regards the disclosure, abandoned the appeal on the morning of the hearing on 19 June 2023.

[4] In support of an argument of total absence of fault and exceptional circumstances in relation to the test for orders for destruction of dogs, Ms Pivott had said in her sworn affidavit that, unknown to her, construction workers had removed a portion of the fencing around her rental property on 20 September 2021, the day before the offence occurred. An affidavit from Ms Pivott's landlord was to the same effect.

[5] However, the contents of the disclosure material provided to Ms Pivott on Sunday 18 June 2023 revealed that the fencing had in fact been missing for at least ten days. There were photographs taken on 10 and 14 September 2021 at the time of property inspections on those dates which showed the missing fencing.

[6] The Council now applies for costs against Ms Pivott on the basis that she withdrew her appeal after the Council discovered that the factual premise of the

¹ *Auckland Council v Pivott* [2023] NZDC 1099.

appeal, as set out in her sworn affidavit, was false. The Council seek costs in excess of the scale costs rate in the sum of approximately \$5,000.

The law

[7] Costs awards in criminal proceedings are governed by the Costs in Criminal Cases Act 1967 (the Act). This application falls under s 9 of the Act, which relevantly provides:

9 Party giving notice of appeal and not prosecuting may be ordered to pay costs

- (1) If a notice of appeal is given under Part 6 of the Criminal Procedure Act 2011 but the appeal is abandoned under that Part, the court appealed to may, subject to any regulations made under this Act, allow the respondent any costs that it thinks fit.
- (2) No costs incurred after notice has been given by the appellant abandoning the appeal shall be allowed.

[8] The regulations made under the Act are the Costs in Criminal Cases Regulations 1987. The maximum scale of costs for an appeal is \$226 for each half day.² However, under the Act the Court has a discretion to award greater costs in certain circumstances:

13 Regulations

...

- (3) Where any maximum scale of costs is prescribed by regulation, the court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.

Discussion

[9] The Council seeks costs on the grounds that the appeal was only abandoned by Ms Pivott after the discovery of a false statement in her affidavit; that there was never an evidential or other basis for Ms Pivott to bring the appeal as she had falsified the evidential basis; and that the appeal was unmeritorious and not brought in good faith.

² Costs in Criminal Cases Regulations 1987, sch 1, pt 1, subpart C at [1].

In support of their overall submissions, counsel for the Council cite *Gu v Auckland Council*³ and *Greendrake v McConnochie*.⁴

[10] To start with, the two cases relied on by the Council are not of assistance. They deal with the section of the Act which relates to the costs of a successful defendant, acquitted of an offence or where the charge is dismissed or withdrawn. The considerations that a court takes into account when considering an application for costs of a successful defendant are set out in s 5(2) of the Act and reflect the policy basis of protecting the public in circumstances where there are issues over prosecutorial conduct. The situation in the present case is fundamentally different. The relevant provision is s 9 of the Act, as set out in [7] above, and for costs above scale, s 13 as also set out above in [8] applies.

[11] I turn to the circumstances of this case.

[12] Ms Libbey, counsel for the Council, says that the fact of the earlier property inspections by the Council on 10 and 14 September 2021 with associated photographs was only discovered the day before the hearing when the prosecutor read through the file while preparing oral submissions. The relevant property inspection reports were sought from Council and provided to counsel for the appellant immediately. The reports revealed that the fencing had been missing for at least ten days. As noted above, upon receiving legal advice, Ms Pivott withdrew the appeal.

[13] Ms Libbey says this was not late disclosure as the previous property inspection forms only became relevant after Ms Pivott put forward the affidavit falsely asserting the fencing was removed only the day prior to the attack.

[14] I do not accept that submission. The disclosure of reports from property inspections undertaken by the Council identifying inadequate fencing was always relevant not only to this appeal but also in the District Court where the proper securement of the dogs was in question.

³ *Gu v Auckland Council* [2018] NZDC 8308, [2019] DCR 111.

⁴ *Greendrake v McConnochie* [2023] NZHC 778.

[15] Furthermore, Ms Pivott's affidavit was filed along with submissions on 23 May 2023, some two weeks before the Council filed its submissions on 8 June 2023, and approximately four weeks out from the hearing on 19 June 2023. There was more than adequate time to provide the further disclosure that may have enabled Ms Pivott to withdraw the appeal earlier. The disclosure could have been provided with the Council's submissions or even prior to their filing of submissions. The late withdrawal by Ms Pivott cannot be criticised when she only received important disclosure the day out from the hearing.

[16] While Ms Pivott can be strongly criticised for filing sworn evidence that is later found to be untruthful, I consider the circumstances of the abandonment of the appeal as referred to above are relevant to whether the Court exercises its discretion to award costs within scale. The award of costs, if an appeal is abandoned, is not guaranteed nor automatic. Although the appeal was abandoned at a very late stage, the abandonment occurred after disclosure on the eve of the hearing which made it apparent that part of the contents of Ms Pivott's affidavit were not correct. Having received legal advice regarding the disclosure, the appellant abandoned the appeal. In all those circumstances I consider that no costs should be awarded against Ms Pivott.

[17] For completeness, even if I had found that costs should be ordered against Ms Pivott, I would not have ordered more than the prescribed scale costs. Ms Libbey submits that the Court should make an order in excess of the scale costs for three reasons: the appeal was only abandoned at the hearing upon the discovery of the appellant's false statement and the Court would have otherwise been misled; there was never an evidential or other basis for Ms Pivott to bring the appeal; and the appeal was unmeritorious and not brought in good faith.

[18] However, none of those three reasons relate to the criteria that need to be satisfied in s 13(3) of the Act for costs to be awarded in excess of scale. In relation to those criteria, there was no special difficulty, complexity, or importance in this case. The Council has not identified any matters to support its argument for costs in excess of the maximum scale costs by reference to those criteria.

Result

[19] The application by the Council for costs is declined.

Gordon J