IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CRI-2024-425-25
[2024] NZHC 1630

BETWEEN	MARTA UHLIG Original Appellant
	TOMAS BRAEUER Substituted Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Hearing: 22 May 2024

Appearances: N T C Batts for Appellant
T J McGuigan for Respondent (via audio-visual link)

Judgment: 20 June 2024

JUDGMENT OF MANDER J

This judgment was delivered by me on 20 June 2024 at 11.30 am
pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

[1] Marta Uhlig seeks to appeal an order made by Judge Duggan in the Queenstown District Court for the destruction of her dog pursuant to the Dog Control Act 1996.[1] The order was made following the conviction of Mr Tomas Braeuer, who was charged by the Queenstown Lakes District Council (the Council) in relation to a dog that was alleged to have attacked a person contrary to that legislation.[2] Ms Uhlig was granted leave in the District Court to be heard in opposition to the making of any destruction order.

Background

[2] On 10 January 2022, the victim in this matter, Mr Mulholland, was walking his two dogs (Molly and Max) on an off-leash track at Lake Hayes near Arrowtown. Mr Braeuer was also walking two dogs in this designated area. One of those dogs, a Labrador called Lincoln was his. The other dog, an American Staffordshire Terrier (Milo) was owned by Ms Uhlig. Mr Braeuer was responsible for Milo, having been granted permission by the dog's owner to walk him that day.

[3] Max and Lincoln were walking ahead of Mr Mulholland and Mr Braeuer. There was an altercation between these two dogs, who were acting aggressively toward each other. Mr Mulholland sought to separate the two dogs and he grabbed Max by the collar. While he was in the process of putting the lead on Max, Milo lunged at Max and Mr Mulholland and bit Mr Mulholland's left forearm.

[4] Mr Mulholland received immediate treatment for his wound from an ambulance that happened to be nearby. He was subsequently transferred to Invercargill Hospital. As a result of the bite, Mr Mulholland received three lacerations which required surgery. A six centimetre wound to his left wrist exposed an artery and caused tendon damage. He also received a five centimetre laceration and a two to three centimetre laceration to his left hand. Mr Mulholland was required to undergo surgery. He remained in hospital overnight and was unable to work for seven weeks.

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1 *Queenstown Lakes District Council v Braeuer* [2024] NZDC 4473.
2 Dog Control Act 1996, s 57(1) and (2).

Procedural history

[5] Because of the issues to which the appeal gives rise, it is necessary to set out the procedural background. Mr Braeuer was charged as the owner of Milo under the extended statutory definition of that term, which includes a person who is in control of or in possession of the dog at the relevant time.[3]

[6] On 30 January 2023, Judge Walker granted leave to Ms Uhlig to file written submissions, including affidavit evidence, and for her counsel to make oral submissions on the issue of a destruction order.[4] The Judge considered it would be contrary to natural justice not to permit her and her partner, as Milo's owners, to be heard on the issue as any order directly affected them. It was also noted that Mr Braeuer had applied for a sentencing indication in relation to a possible discharge without conviction, pursuant to s 106 of the Sentencing Act 2000.[5]

[7] The sentence indication hearing took place on 26 April 2023 before Judge Farnan.[6] The Judge did not consider a discharge without conviction was appropriate. However, it was indicated that were Mr Braeuer to plead guilty the Judge would consider convicting and discharging him, on the condition he made an emotional harm payment to the victim. Also on that date, counsel for Ms Uhlig appeared and advised the Court that the Council's summary of facts was not accepted and that, for the purpose of the hearing regarding the destruction order, Milo's owners reserved the right to dispute the Council's factual assertions. Judge Farnan noted on the Court file that the owners of the dog wished to be heard and that the issue of the destruction of the dog would have to await sentencing.

[8] There was some period of delay but after clarification of the terms of the emotional harm payment and out of pocket expenses to the victim, Mr Braeuer formally accepted the sentence indication on 22 August 2023. The matter was set down for sentencing on 27 November 2023. Timetabling orders for the filing of

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3 Dog Control Act, s 2.
4 *Queenstown Lakes District Council v Braeuer* DC Queenstown CRI-2022-059-364, at [5]–[8], minute of Judge Walker.
5 At [4].
6 *Queenstown Lakes District Council v Braeuer* [2024] NZDC 7765.

submissions, including in relation to the issue of a destruction order, were made at that time.

[9] On 27 November 2023, Mr Braeuer formally entered a guilty plea. However, he indicated he wished to renew his application for a discharge without conviction on the basis of new material. Directions were also made by Judge Duggan as a result of her concern as to what the "circumstances actually were at the time of the attack". It was noted these were disputed and could not be resolved at that time. It was determined a disputed facts hearing would be necessary. That hearing together with sentencing were set down to proceed on 4 March 2024. The Court also directed the Council to obtain written statements from two eyewitnesses referred to in a notebook entry made by an attending police officer.

[10] On 14 February, a teleconference was held with the parties. This followed the filing of memoranda by both Ms Uhlig and the Council. The day after the 27 November hearing, Ms Uhlig's counsel sought a transcript of that hearing which was declined. On 30 January 2024, the Council also filed a memorandum requesting such a transcript.[7] Unfortunately, this memorandum was not served on Ms Uhlig. Having since obtained a copy, it is submitted on her behalf that a significant portion of that memorandum set out the Council's substantive opposition to the holding of a disputed facts hearing and the direction the Council obtain witness statements from the eyewitnesses.

[11] The teleconference focused on the need for a disputed facts hearing and whether there should be evidence called on 4 March about the circumstances at the time Mr Mulholland was bitten by Milo. In respect of that issue, the Judge subsequently issued a minute dated 14 February 2024 in which she made the following ruling:

> [5] In relation to the first issue, for the dog owners, [Ms Uhlig's counsel] submits that there are exceptional circumstances because of the instructions given to Mr Braeuer that Milo was to be kept on a lead and Mr Braeuer's acceptance that he ignored those instructions. If, on its own I do not consider

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7 It appears Mr McGuigan, who appeared for the Council in the Queenstown District Court on 27 November 2023, was not present when Judge Duggan made her directions on that day. The Judge had granted him leave to be excused so he could catch a flight back to Christchurch, hence his application for a transcript of the hearing.

> the instructions to be an exceptional circumstance, [Ms Uhlig's counsel] submits it would or should be in combination with the circumstances at the time Mr Mulholland was bitten. [Ms Uhlig's counsel] submits that on the material disclosed to the defendant (and his clients) it appears that Milo was not attacking Mr Mulholland, rather that Milo was defending Mr Braeuer's dog and Mr Mulholland's arm (as he was putting his dog on a leash) was caught up in the fracas between the dogs. [Ms Uhlig's counsel] submits that before determining the issue of exceptional circumstances, I must determine what was happening at the time that Mr Mulholland's arm was bitten. [Counsel for the Council] is opposed to any evidence being required because of Mr Braeuer's guilty plea to the charge and the agreed summary of facts.
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> [6] I have reflected on the submissions made by counsel and the wisdom of my directions of 27 November. [Counsel for the Council] did not, through no fault of his, have the opportunity to make the submissions he made during the teleconference. I accept the logic of his submissions. That said, so as to ensure that the greatest fairness is also extended to Milo's owners, I will when determining the issue of destruction, consider whether if Mr Mulholland's arm was effectively inadvertently bitten by Milo, is in combination with the failure of Mr Braeuer to follow the instructions given to him, amount to exceptional circumstances. There is no need for any evidence to be called/heard.

[12] For completeness, I record that following the receipt of Judge Duggan's minute further memoranda were filed by Ms Uhlig, on 21 and 23 February 2024, reiterating to the Court there remained a disagreement between the Council and herself concerning the circumstances in which Mr Mulholland was bitten and that evidence would need to be heard to resolve that issue. In order to formally preserve her position, leave was again sought to call evidence. This further application was addressed by the Judge prior to making her ruling on the destruction order.

[13] On 4 March, Mr Braeuer was convicted of a charge of being an owner of a dog (Milo) that attacked a person contrary to s 57(1) and (2) of the Dog Control Act. He was ordered to pay reparation of $4,920.

District Court decision

Decision to decline leave to call evidence

[14] At the outset of her ruling, the Judge addressed Ms Uhlig and her partner's application, which was supported by Mr Braeuer, for leave to be granted to have Mr Braeuer give evidence about the circumstances at the time Mr Mulholland was bitten. That application was declined as the Judge was not satisfied Mr Braeuer's evidence would assist her in determining the issue of exceptional circumstances. The

Judge observed that had she granted leave the Council had indicated it would then seek leave for Mr Mulholland to give evidence and he was not available and would need to be summonsed. The matter proceeded without evidence from either side.

[15] Following the delivery of the Judge's ruling regarding the destruction order, Ms Uhlig's counsel contested the Judge's description of Milo's owners' request as being an application for leave to call evidence from Mr Braeuer, which, it was submitted, did not accurately reflect the application that had been made. This was described as an application to hear all available evidence to determine the circumstances in which Mr Mulholland was bitten. However, I observe it is not entirely clear what further evidence was available to be called on 4 March 2023, apart from that sourced from Mr Braeuer who was present for sentencing.

Decision to order destruction

[16] In addressing the issue of the destruction order the Judge referred to the guidance provided by the Court of Appeal in *Auckland Council v Hill* regarding the approach to be taken to the test for exceptional circumstances under the Dog Control Act.[8] This required the Court to focus on the circumstances of the offence or the attack and the risk that similar circumstances will occur in the future. The Judge concluded the fact Milo had engaged in a deliberate aggressive action by biting Mr Mulholland established there was a risk that Milo will bite or engage in such a deliberate action again in similar circumstances. Against that background, the Court identified its task as being to determine whether the circumstances as advanced by Milo's owners were sufficiently exceptional that the risk of another bite or deliberate aggressive action was remote and that Milo's destruction would not be justified in the interests of public safety.

[17] In reviewing the circumstances at the time Mr Mulholland was bitten, the Judge, as she did for the purpose of sentencing Mr Braeuer, accepted that Mr Braeuer had been told by Milo's owners to keep him on his lead and that the reason they had given him that instruction was their concern about the risk that Max, if he was being walked at the same time as Milo, might pose. It was observed that despite that

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8 *Auckland Council v Hill* [2020] NZCA 52.

instruction to Mr Braeuer, Milo was not on his lead when the altercation occurred between Max and Lincoln and that it was clear that confrontation had developed to include Milo.

[18] The Judge identified the bite to Mr Mulholland as having occurred while he was putting a lead on his dog. The suggestion that in doing so Mr Mulholland was behaving in a "gung ho" way and that other methods could have been employed by him was rejected. The Judge did not consider it exceptional that Mr Braeuer did not follow Milo's owners' instructions or that he allowed Milo off the lead in an off-leash park. There was nothing exceptional about human error. Neither did the Judge consider it exceptional or even unusual for Milo to join in the altercation or confrontation between two other dogs, or for the owner of one dog involved in such an altercation or confrontation to try and remove their dog. The Judge did not consider it exceptional for an owner to hold their dog by its collar and attempt to put a lead on the dog to pull it away. Nor was it considered unusual in such a situation for hands and arms to be put into a position where there was a risk they may be bitten given their proximity to another dog's mouth.

[19] The Judge held it was impossible to determine whether Milo intended to attack Mr Mulholland or his dog Max as that would require an enquiry into the psychology or intention of the dog, which the Judge considered the Court of Appeal had made plain the Court was not required to undertake. Allowing for the circumstances advanced on behalf of the owners of Milo, namely the specific instructions that had been given to Mr Braeuer and that it was likely impossible to determine whether the dog intended to attack Mr Mulholland or whether the attack was accidental, the reality was that Milo had joined in an altercation between the dogs that had resulted in Mr Mulholland being bitten by Milo. The Judge did not consider those circumstances were so exceptional that the risk of a similar attack in the future was remote, and concluded it was in the interests of the public for a destruction order to be made.

Standing to bring appeal

[20] Ms Uhlig has brought the appeal against the destruction order in her own name. It would appear, at least initially, that it was filed as an appeal against sentence

pursuant to s 244(1) of the Criminal Procedure Act 2011, which includes an appeal against "any method of disposing of the case following conviction".[9] However, this right of appeal against sentence is only conferred on "[a] person convicted of an offence". As an alternative argument, reliance was placed on s 124 of the District Court Act 2016, which provides for a general right of appeal. It was submitted the making of a destruction order should be viewed as the exercise by the court of its civil jurisdiction.

[21] Various submissions were made in support of either provision having application in order to found jurisdiction for Ms Uhlig to appeal the destruction order. Particular emphasis was placed on s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides for the right to the observance of the principles of natural justice and to s 6, which requires an enactment to be given a meaning consistent with the rights and freedoms contained in NZBORA in preference to any other meaning.

[22] Mr Batts, on behalf of Ms Uhlig, argued that an "expansive approach" should be taken to the term convicted person in s 244(1) of the Criminal Procedure Act to include a person in Ms Uhlig's position. Reference was also made to s 129EA of the Sentencing Act 2002, which permits a third party who was not the offender to appeal an order confiscating a motor vehicle on the grounds of undue hardship. However, while illustrative of the type of appeal sought to be brought by Ms Uhlig, the express provision of an appeal pathway for a person other than an offender to appeal a confiscation order tends to underline the need for statutory authority to found jurisdiction for an appeal.

[23] A significant difficulty Ms Uhlig faced in seeking to personally pursue an appeal is that the issue has previously been considered by the Court of Appeal. In *Auckland Council v Hill*, Palmer J in the High Court did not consider an appeal against a dog destruction decision was an appeal of the owner's sentence under s 246 of the Criminal Procedure Act, but rather involved an appeal of a concomitant statutory power which fell under the general right of appeal provided by s 124 of the District Court Act.[10]

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9 Criminal Procedure Act 2011, s 212.

10 *Auckland Council v Hill* [2018] NZHC 3315 at [2] and [28].

[24] That approach was rejected by the Court of Appeal in its decision to grant leave to the local authority to appeal the High Court's dismissal of its appeal from the District Court's refusal to make a destruction order. The Court of Appeal reasoned as follows:[11]

> [8] Mr Meyer, for Mr Hill, supported the Judge's decision. He argued that the decision to order destruction is a risk avoidance mechanism, separate to the sentencing of the owner and not amenable to the purposes and principles of the Sentencing Act 2002, which relate only to the owner of the dog rather than the dog itself. He relied, as the Judge did, on two High Court decisions. In *Jorion v Kapiti Coast District Council* Dobson J considered that s 57(3)"can only be seen as having a preventive motive rather than any punitive one". In *Pukepuke v Auckland Council* Jagose J took the same view saying that "destruction orders should not be seen as part of any sentencing process, but as a separate risk avoidance mechanism".
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> [9] Mr Marchant, for the Auckland Council says that this approach is wrong and that an order for destruction is criminal in nature and its appeal is properly brought under s 253(2) of the CPA.
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> [10] We agree. We start from the obvious position that a prosecution under s 57(2) of the Dog Control Act is a criminal proceeding because it results in a conviction. The opening words of s 57(3), "[i]n any proceedings brought under subsection (2)", make it clear that a dog destruction order can only be made in the context of those criminal proceedings. It follows that an order made under s 57(3) is criminal in nature. In addition, a dog destruction order falls within the definition of a sentence in s 212 of the CPA, being a "method of disposing of a case following conviction".
>
> (footnotes omitted)

[25] The Court of Appeal concluded the application for leave to appeal by the local authority had been correctly brought under the Criminal Procedure Act. Mr Batts sought to distinguish the Court of Appeal's decision on the basis it involved an application to bring a second appeal by a prosecutor and did not involve the situation of a third party. That is so, but it does not alter the Court's finding that an order made under s 57(3) of the Dog Control Act is criminal in nature and falls under the definition of a sentence in s 212 of the Criminal Procedure Act, being a "method of disposing the case following conviction".

[26] As already noted, Mr Batts submitted as an alternative argument that the term "convicted person", as it is used in s 244(1) of the Criminal Procedure Act, should be

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[11] *Auckland Council v Hill* [2019] NZCA 296.

interpreted to extend to a person in Ms Uhlig's position. However, while I accept the need to approach jurisdictional questions in a NZBORA consistent manner, criminal appeals are prescribed by statute and the Court must be careful to observe the jurisdictional limitations imposed by Parliament.[12] The Supreme Court has observed that the term "convicted person" is a "shorthand" reference for "a person who has been convicted at trial".[13] Ms Uhlig simply does not fall into that category of person. It follows that any challenge to the Court's decision by a third party is limited to an application for judicial review.

An alternative course

[27] Having heard Mr Batts on the question of the Court's jurisdiction to determine an appeal brought by Ms Uhlig, I enquired about the possibility of Mr Braeuer, as the "person convicted" being substituted as the appellant for the purposes of an appeal pursuant to s 244 of the Criminal Procedure Act. Following a short adjournment, Mr Batts confirmed he had discussed the position with Mr Braeuer, who confirmed his willingness to "stand in the shoes" of the appellant and for Mr Batts to prosecute the appeal in his name should the Court consider it was otherwise without jurisdiction to hear the appeal. Mr McGuigan, after obtaining instructions from the Council, did not seek to be heard on that potential course. He advised the Council would abide the decision of the Court should that be considered, in the circumstances, an appropriate step.

[28] To substitute one person for another as an appellant is highly unorthodox. However, I do not consider the respondent is prejudiced by such a course. By remedying the jurisdictional difficulty the substance of the appeal can be heard and its merits determined without further delay. An alternative course would have been to simply dismiss Ms Uhlig's appeal for lack of jurisdiction. However, that would not have prevented a subsequent appeal by Mr Braeuer, albeit one requiring leave to being brought out of time. In order to avoid cost and delay, I therefore proceed on the basis that Mr Braeuer, as the convicted person, has brought the appeal pursuant to s 244 of the Criminal Procedure Act and grant leave for him to do so out of time.

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12 *Cameron v R* [2021] NZSC 110 at [25].
13 At [26].

The appeal

[29] The appeal is brought on two grounds:

(a) It is alleged the Judge erred in refusing to hear evidence to establish the circumstances in which Mr Mulholland was bitten; and alternatively that

(b) the Judge erred in not making a finding of exceptional circumstances.

[30] In support of the appeal, affidavit evidence was sought to be adduced from an eyewitness, Samuel McAtamney.

Did the Judge err by declining to convene a disputed facts hearing and hear evidence

The argument

[31] Mr Batts argued the Judge's "mischaracterisation" of the dog owners' application to call evidence as being limited to evidence solely from Mr Braeuer, rather than all potentially available evidence led the Court into error. It was submitted the Council had failed to comply with the Court's direction to obtain witness statements from the eyewitnesses and that these directions had never been rescinded. Accordingly, it was claimed that until the 4 March hearing it was unclear whether viva voce evidence would be heard.

[32] It was further submitted that despite the Judge indicating she would consider the possibility that Mr Mulholland had been accidentally bitten when deciding whether exceptional circumstances arose, the Court proceeded, on the basis of the Council's summary of facts, and concluded that it could not make such a factual determination because doing so would involve speculating as to Milo's psychology. It was argued that, to the extent the Judge was unable to make any determination to whom any aggression from Milo was directed, this was the result of insufficient evidence having been adduced on the point and not because that issue could not be determined.

[33] It was further argued the Judge had erroneously relied upon disputed factual assertions, including that Mr Mulholland had separated his dog from the altercation with Milo and was leading his dog away when he was bitten, at which point it was submitted the Judge accepted that Milo had lunged at Mr Mulholland, none of which were facts that were accepted by Milo's owners. It followed that the Judge had relied on facts that were clearly in dispute in dismissing the argument there were exceptional circumstances which could otherwise have been explored and clarified by evidence. In this regard, reliance was placed on Mr McAtamney affidavit.

Analysis

[34] There was agreement between the parties that the question of whether oral evidence should be heard by a court in this situation was governed by s 24 of the Sentencing Act. That provision provides:

> **Proof of facts**
>
> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
>
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
>
> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:
>
> (c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

...

[35] Mr Batts submitted that it was uncontroversial that a destruction order can be considered part of the disposition of the dog attack prosecution against Mr Braeuer. He argued that Milo's owners had consistently made it known they contested the Council's summary of facts and that despite Mr Braeuer's guilty plea and acceptance of that summary for the purposes of his sentencing, it should not bind Milo's owners. However, as noted by Mr McGuigan on behalf of the Council, a court must accept as proved all facts, expressed or implied, that are essential to a plea of guilty or a finding of guilt.

[36] In *Archer v R*, the Court of Appeal observed that the Sentencing Act distinguishes between material facts already proved by trial evidence or implicit in the finding of guilt, on the one hand, and material facts the parties may agree or prove for sentencing purposes, on the other.[14] Facts which are essential to a plea of guilty or a finding of guilt must be accepted by the court as proved and only facts that are not otherwise encompassed in the guilty plea or finding can be disputed.[15]

[37] It is convenient at this point to refer to s 57 of the Dog Control Act, which sets out the offence of which Mr Braeuer was convicted:

57 Dogs attacking persons or animals

(1) A person may, for the purpose of stopping an attack, seize or destroy a dog if—

(a) the person is attacked by the dog; or

(b) the person witnesses the dog attacking any other person, or any stock, poultry, domestic animal, or protected wildlife.

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14 *Archer v R* [2017] NZCA 52 at [11].

15 Sentencing Act, s 24(1)(b); and Simon France (ed) *Adams on Criminal Law — Criminal Procedure* (online ed, Thomson Reuters at SA.24.07).

> (2) The owner of a dog that makes an attack described in subsection (1) commits an offence and is liable on conviction to a fine not exceeding $3,000 in addition to any liability that he or she may incur for any damage caused by the attack.
>
> (3) If, in any proceedings under subsection (2), the court is satisfied that the dog has committed an attack described in subsection (1) and that the dog has not been destroyed, the court must make an order for the destruction of the dog unless it is satisfied that the circumstances of the offence were exceptional and do not warrant destruction of the dog.
>
> ...

[38] A prerequisite to the court's jurisdiction to make a destruction order is that a dog has committed an attack described in subs (1), which in turn, as in the present circumstances, is dependent on a person having been attacked by the dog but also includes an attack on any domestic animal.[16] That is a fact that is essential to the commission of the offence. After the entry of Mr Braeuer's guilty plea and his conviction for that offence, it was not open to a court, under s 57(3), to conclude the circumstances of the offence were exceptional by finding the dog had not attacked the person (or, if necessary, a domestic animal) and that the offence had not been committed. Such an outcome is not permitted by s 24 of the Sentencing Act.

[39] It was argued that Mr Braeuer's acceptance of having committed an offence against s 57(2) should not bind Milo's owners and they should be entitled to effectively relitigate whether an offence had been committed for the purposes of demonstrating exceptional circumstances. There are two difficulties with that approach. First, the exceptional circumstances, as they are referred to s 57(3), are that of the *offence*. The provision does not contemplate an offence having not been committed in the context of deciding whether an otherwise mandatory destruction order should be made. Second, the only basis upon which the appeal can be pursued is by Mr Braeuer, who does not seek to impugn his guilty plea or vacate its entry for the offence upon which the destruction order is dependent.[17]

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[16] Dog Control Act, s 2 defines a "domestic animal" as including:
(a) any animal (including a bird or reptile) kept as a domestic pet:
(b) any working dog:
(c) any other animal kept by any person for recreational purposes or for the purposes of that person's occupation or employment

[17] *Fountain v Auckland Council* [2018] NZHC 591.

[40] As a fallback position, in the alternative to relying on a disputed facts hearing convened pursuant to s 24(2) of the Sentencing Act, Mr Batts argued that in the circumstances the owners' right to natural justice required the Court to hear from witnesses regarding the circumstances in which Milo bit Mr Mulholland, which it was submitted had been recognised at an earlier stage of the proceeding when permission had been granted to file evidence. For the reasons already canvassed, I doubt whether such a course was available after Mr Braeuer pleaded guilty, at least insofar as it was sought to contest any element of the offence as it appears, albeit belatedly, to have become apparent to the District Court by the time of the telephone conference on 14 February 2024. However, for the purpose of the argument presented on the appeal, I will review the matters put forward on behalf of the dog's owners to assess whether any procedural unfairness arose from the approach ultimately taken by the sentencing Court.

[41] In relation to the complaint that the Judge misconstrued counsel's request to call evidence as an application limited to evidence from Mr Braeuer, I do not consider it was of any material consequence. The Judge had made her decision regarding whether it was necessary for her to hear any evidence at the conclusion of the teleconference on 14 February, which she recorded in her minute of the same date, as set out earlier at [11].

[42] In her ruling of 4 March 2024, the Judge expressly referred to having declined to give leave "for anyone to give evidence about the circumstances at the time Mr Mulholland was bitten".[18] This is consistent with the Judge's earlier decision on the issue and is presumably the reason why only Mr Braeuer, who was appearing for sentence, was available as a witness, with no arrangements or enquiries having apparently been made about whether anyone else would need to be present for the purpose of giving evidence. It follows that notwithstanding the renewal of the application to call evidence, which would have necessitated the matter being adjourned, no procedural unfairness arose as everyone present must have been aware of the Judge's earlier ruling.

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[18] *Fountain v Auckland Council*, above n 17, at [27].

[43] I consider it was clear from Judge Duggan's minute of 14 February 2024, in which the Judge acknowledged, having reflected on the wisdom of her directions of 27 November, that she had reached the view that no evidence was to be called. Mr Batts sought to submit there had been no explicit cancellation of the Court's earlier direction to obtain witness statements from the eyewitnesses, but that was obviously implicit from the Judge's minute of 14 February when she stated that she accepted the logic of the Council's submission and there was no need for any evidence to be "called/heard".

[44] I also reject the submission the Judge proceeded to determine the issue of destruction on the erroneous understanding that Mr Mulholland, after separating his dog from the altercation, "was leading it away" when he was bitten. That claim is without foundation. In sentencing Mr Braeuer, the Judge described how Mr Mulholland, in order to separate the dogs, grabbed Max by the collar and was in the process of putting the lead on Max. Later in her decision, the Judge stated Milo bit Mr Mulholland when he was putting a lead on Max, before making the observation that it is not unusual, let alone exceptional, for an owner to hold their dog by its collar and attempt to put a lead on the dog to pull it away from an altercation or confrontation. The Judge at no time suggested or purported to make a factual finding that Mr Mulholland was leading his dog away when Milo attacked.

[45] A further alleged error under this ground of the appeal was that evidence should have been permitted to have been led to demonstrate the attack by Milo was not the result of a deliberate aggressive act and that, as a result, exceptional circumstances existed which would have rendered an order for Milo's destruction inappropriate. However, leaving to one side the difficulties with that submission in terms of essentially putting in issue whether an offence had been committed, the Judge's approach to the facts included an acceptance that it was not possible to discern whether Milo was lunging at Max or attacking Mr Mulholland at the time he was bitten and, moreover, whether it was the dog's intention to bite Mr Mulholland as opposed to Max.

[46] The Judge described Mr Mulholland holding Max by the collar and being in the process of putting his leash on him when "Milo lunged at Max *and* Mr Mulholland,

and Milo bit Mr Mulholland's left forearm". The Judge recorded that one of the grounds put forward by Milo's owners in support of a finding of exceptional circumstances was that the bite was an accident because Milo was responding, as dogs do, to the aggression or the altercation between Max and Mr Braeuer's dog, Lincoln. The submission made on behalf of Milo's owners that Milo had no intention of biting Mr Mulholland was also expressly recorded by the Judge. However, she concluded it was impossible to determine whether Milo intended to attack Mr Mulholland "because it would require enquiry into the psychology of the dog, which is an impossible task".[19]

The fresh evidence

[47] I turn now to the fresh evidence sought to be tendered in support of the appeal.

[48] Subject to objection to some inadmissible expressions of opinion made by Mr McAtamney which speculate as to Milo's intention when biting Mr Mulholland, the Council did not oppose the admission of Mr McAtamney's affidavit for the purpose of the appeal. I consider that was a correct concession in the circumstance of this case given the basis upon which the appeal was brought.

[49] Shortly after the incident, Mr McAtamney made the following statement to an attending police officer which he signed and confirmed to be true and accurate:

> *Male pushes bike*
> *Male in cap with dogs*
> *dogs showed interest in male*
> *that had the bites.*
> *sniffed around*
> *There was a white one pitbull,*
> *The other dog looked like a lab*
> *The dogs have fought first then*
> *the injured man tried to pull*
> *them apart*

[19] Citing *Auckland Council v Hill*, above n 8, at [75].

The pitbull bit his hand

The now injured male pulled

away from the dogs then

the pitbull attacked the lab

we were a very short distance

a couple of feet away from it.

[50] In addition, Mr McAtamney stated the following in his affidavit:

> 12. I can't now recall whether the man who was injured interacted with the dogs before he tried to separate them. What I do remember, is that once the dogs started barking and snarling, the man who got bitten charged straight into the middle of the dogs and basically just stuck his hands right in between the face/mouths of dogs who were going off at each other. The man was right next to the dogs standing over them with his hands right next to their heads trying to get them apart.
>
> 13. It was while the male was trying to separate the dogs like this that he got bitten by the "Pitbull". I do not know what the bread [sic] of the dog was that bit the man but it looked a bit like a Pitbull so that is what I called it.
>
> 14. I do not think that the dog meant to bite the man. The Pitbull did not seem interested in the guy at all - he was focused on the other dog the guy had with him. It seemed to me like the man was bitten by accident because he put his arms right in between the dogs' heads. I do not recall seeing anything that would have indicated that the Pitbull meant to bite the man.

[51] Mr McAtamney's statement that he "did not think the dog meant to bite the man" constitutes inadmissible opinion, and the balance of his evidence of what he observed does not alter the factual basis upon which the District Court proceeded, namely that it was not possible to determine whether Milo intended to attack Mr Mulholland or his dog Max. The District Court decision was premised on it not being able to conclude whether Mr Mulholland was deliberately bitten by Milo or whether that had occurred accidentally as a result of Milo having attacked his dog Max. Mr McAtamney's admissible evidence of what he saw does not materially diverge from the factual basis upon which the Judge proceeded.

Exceptional circumstances

The argument

[52] Mr Batts submitted the District Court had erred in ordering the destruction of Milo because, contrary to the Judge's decision, a dog bite is not necessarily the result of an act of deliberate aggression. It was argued that it was wrong to reason from the fact of a bite to the conclusion the injury was necessarily the result of a deliberate aggressive act. It was further submitted the Judge had conflated the concepts of "deliberateness and aggressiveness" and that it was not sufficient for the Council to establish that Milo was being aggressive in a general sense but that such aggression needed to be specifically directed to the person or animal who the dog is alleged to have attacked.

[53] It was argued that the District Court, when assessing the circumstances, had given insufficient regard to how Mr Braeuer had elected not to intervene as he considered at the time that it would be unwise or dangerous to do so. It was submitted that not every risk associated with the ownership of the dog can trigger the public safety considerations that underly the making of destruction orders and the assessment of exceptional circumstances. In this regard, it was argued there is always some residual level of risk or potential for harm associated with every dog as a result of them being sentient beings, and that how humans react in certain circumstances can influence whether "natural and unavoidable occasional animal aggression" may cause injury or the risk of harm.

[54] Finally, in regard to the Judge's analysis of whether there were exceptional circumstances, it was submitted the Court had confused an enquiry "into the psychology of the dog" with the task of drawing reasonable inferences regarding the dog's behaviour to determine whether the bite was the result of deliberate aggressive action or had been accidental. It was submitted a distinction needs to be drawn between that exercise and the Court attempting to predict how a dog may act in the future. While it was acknowledged that seeking to determine why a dog has acted at a particular point in time may involve impermissible speculation, it was argued that question can at times be addressed by drawing permissible reasonable inferences

depending on the circumstances of the case and the nature of the evidence. It was submitted the present case was such an example.

Analysis

[55] Section 57(3) of the Dog Control Act provides that the court must order the dog's destruction if "satisfied that the dog has committed an attack described in subsection (1)". In *Turner v South Taranaki District Council*, Miller J observed that the term "committed" suggests purposeful action and that attacks would usually involve actual or attempted biting, before concluding that "[p]hysical contact between dog and victim will suffice so long as it results from deliberate aggressive action".[20]

[56] In *Hill v Auckland Council*, the Court of Appeal, in addressing the approach to be taken to the application of s 57(3), held that the first step was to identify the relevant circumstances of the offence, which in this context was equivalent to the "circumstances of the attack".[21] The second step was for the Court to ask whether those circumstances were exceptional and did not warrant destruction of the dog.[22] In that regard, the Court of Appeal observed:

> [6] ... Section 57(3) proceeds on the basis that the attack of itself establishes that there is a risk of the dog attacking again in similar circumstances. The focus is on whether those circumstances were sufficiently exceptional that that risk is remote, and does not justify destruction of the dog in the interests of public safety.
>
> [7] It is not open to the dog's owner to argue that the dog can be expected to behave differently in similar circumstances in the future — for example, as a result of post-attack training. Rather, the focus is on the risk that the dog poses to people and animals assuming it can be expected to behave in the same way in similar circumstances.

[57] In amplification of this second step, the Court of Appeal held:

> [75] This test requires the court to focus on the circumstances of the offence/attack, and the risk that similar circumstances will occur in the future. It does not require the Court to undertake the difficult, if not impossible, task of inquiring into the psychology of the dog and making predictions about how the dog is likely to behave in the future. The inquiry contemplated by the Act is in our view much simpler. Section 57(3) proceeds on the basis that the

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20 *Turner v South Taranaki District Council* [2013] NZHC 1603 at [21] citing *Jack v Manukau City Council* HC Auckland M1698/99, 14 December 1999.

21 *Auckland Council v Hill*, above n 8, at [5], [62] and [69].

22 At [6].

> previous attack establishes that there is a risk of the dog attacking again in similar circumstances. So the focus is on whether those circumstances were sufficiently exceptional that that risk is remote and does not justify destruction of the dog in the interests of public safety.

[58] The Judge proceeded on the basis that Milo's biting of Mr Mulholland was a deliberate aggressive action and therefore constituted an attack. It was accepted that it was not possible to determine whether Milo intended to attack Mr Mulholland or his dog Max because that would require having to examine Milo's intention or required an "enquiry into the psychology of the dog" which is a difficult, if not impossible, task which the Court of Appeal observed was not required to be undertaken. To the extent Mr Batts sought to argue that hearing evidence would have assisted the assessment of that issue, I do not consider that submission is borne out by Mr McAtamney's evidence about what he observed.

[59] Determining the issue on the alternative basis that Milo was attacking Mr Mulholland's dog at the time he came to bite Mr Mulholland does not assist Mr Batts' argument because the Judge proceeded on the possibility that was the case and that it was not possible to determine whether Milo intended to attack Mr Mulholland or his dog. Insofar as there may be any suggestion that Mr Mulholland's injuries were somehow the result of him placing his hand or arm into or beside Milo's mouth while the dog was barking or snarling and baring its teeth, and somehow ended up accidentally biting Mr Mulholland's arm, I do not consider that is a reasonable or realistic scenario that can sensibly be entertained, particularly when regard is had to the nature of Mr Mulholland's wound. There is no tenable basis for such a theory or to suggest the injury was other than the result of a deliberate bite, albeit one that could have been intended for the other dog. It needs to be remembered that an attack by a dog on another ("a domestic animal") is also sufficient to constitute an offence under s 57.

[60] I do not consider the Judge's reasoning that Mr Mulholland's intervention to remove his dog did not render the circumstances exceptional is realistically open to challenge. Nor that the exposure of a hand or arm to being bitten in such a situation, by coming into proximity to the other dog's mouth, would justify such a finding. The Judge concluded that whether Milo intended to attack Mr Mulholland or whether the

bite was accidental the dog had joined in the altercation with the other dogs. Whether his intention was to attack another dog or Mr Mulholland, the fact remained he had ended up biting Mr Mulholland. I accept that Mr Mulholland's intervention to remove his dog, despite perhaps the wisdom in doing so, would be a common reaction of many dog owners in that situation, despite Mr Braeuer's apparent contrary opinion. The fact he ended up being bitten by Milo as a result does not make the circumstances of the attack exceptional. Nor would it be unusual to suggest the risk of a similar attack would be sufficiently remote to be satisfied the interests of public safety do not require the making of a destruction order.

Conclusion

[61] Because of the factual basis upon which the Judge proceeded to assess the question of whether the circumstances of the offence were exceptional, I do not consider the District Court erred in failing to hold a disputed facts hearing or in proceeding to determine the issue of the destruction order without hearing evidence. I do not consider Mr McAtamney's evidence materially bears on the Judge's approach to the question, which took into account the impossibility of determining whether Milo intended to attack Mr Mulholland or his dog Max.

[62] I am also satisfied the Judge correctly approached her assessment of the issue of whether the circumstances of the offence were exceptional, which again was based on an acceptance that it was not possible to determine whether Milo intended to attack Mr Mulholland or whether the bite he received was the accidental result of Milo attacking his dog.

Result

[63] The appeal against the destruction order is dismissed.

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