IN THE COURT OF APPEAL OF NEW ZEALAND

CA444/2012
[2013] NZCA 429

BETWEEN	DARYL KIRSTY REID BALFOUR Appellant
AND	THE QUEEN Respondent

CA445/2012

BETWEEN	DAVID NEIL BALFOUR Appellant
AND	THE QUEEN Respondent

Hearing:	25 July 2013
Court:	White, Goddard and Simon France JJ
Counsel:	E J Forster for Appellants S B Edwards for Respondent
Judgment:	13 September 2013 at 10.00 am

JUDGMENT OF THE COURT

A The application by the appellants for leave to adduce further evidence on appeal is declined.

B The appeals against conviction and sentence are dismissed.

C The appeal against the orders for costs is allowed and the orders made in the District Court under the Costs in Criminal Cases Regulations 1987 and the Witnesses and Interpreters Fees Regulations 1974 are set aside.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] Mr and Mrs Balfour (the Balfours) appeal against their convictions following a 30-day judge-alone trial in the District Court at Palmerston North on the following three representative charges brought under ss 10 and 12(a) and s 29(a) of the Animal Welfare Act 1999 (the AWA):[1]

(a) failing to ensure that the physical, health, and behavioural needs of no more than 87 dogs were met (count 1);

(b) failing to ensure that the physical, health, and behavioural needs of no more than 161 cats were met (count 2); and

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1 *R v Balfour* DC Palmerston North CRI-2007-010-136, 22 December 2011 [conviction decision].

(c) ill-treating no more than 161 cats (count 4).

[2] They also appeal against their sentences, comprising fines totalling $12,500 each, payable to the Royal New Zealand Society for the Prevention of Cruelty to Animals (the SPCA) under s 171 of the AWA, disqualification from owning cats or dogs (other than their own pets) for a period of 20 years,[2] and orders for costs under the Costs in Criminal Cases Regulations 1987 and the Witnesses and Interpreters Fees Regulations 1974 totalling $27,818.08.[3]

[3] The Crown did not submit that the Balfours required leave to appeal against the costs orders. We adopt the view that leave is not required under s 379CA of the Crimes Act 1961,[4] but if leave had been required, we would have been prepared to treat the notice of appeal as an application for leave and would have granted an extension of time under s 379CA(4).

[4] The Balfours were acquitted on a fourth representative charge of ill-treating no more than 87 dogs.[5] In addition, although under count 1 the Crown alleged that the Balfours had failed to meet their obligations in respect of four of the specified physical, health, and behavioural needs set out in s 4 of the AWA, the Judge found that this allegation was proven only in respect of one of those needs.[6] An application by the Crown under s 173 of the AWA for the Balfours to pay the expenses of the SPCA incurred when their property was searched was also declined.[7]

[5] The charges against the Balfours were brought following the search of their rural property where they ran a commercial partnership with their partner Mr Moir breeding pedigree cats and dogs. The search under warrant was conducted on 5 March 2007 by officers of the SPCA, appointed as inspectors under the AWA,[8] and

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2 *R v Balfour* DC Palmerston North CRI-2007-010-136, 29 June 2012 [sentencing decision].
3 *R v Balfour* DC Palmerston North CRI-2007-010-136, 3 May 2013 [costs decision].
4 *R v Connolly* (2007) 23 NZTC 21,172 (CA) at [10]; *R v Connolly* [2008] NZCA 548, (2009) 24 NZTC 23,305 at [51]; *Jones v Civil Aviation Authority* [2009] NZCA 240.
5 Conviction decision at [386].
6 Judge Fraser found that allegations that the dogs did not receive proper and sufficient food and water, adequate shelter, or the opportunity to display normal patterns of behaviour were not proven: see [93], [154], and [264]. The allegation that the dogs did not receive protection from, and rapid diagnosis of, any significant injury or disease was proven: see [320].
7 Costs decision at [10]–[25].
8 Animal Welfare Act 1999 [AWA], s 124(2).

the police.[9] The search was also filmed by a Television New Zealand (TVNZ) cameraman contracted by the SPCA to film evidence as an "assistant".[10]

[6] In a largely successful pre-trial challenge to the validity of the search, the Balfours obtained orders from Judge Garland in the District Court excluding from their trial the TVNZ film and all evidence relating to the Balfours' home.[11] The remainder of the evidence obtained during the search, in particular the observations and photographs of the SPCA officers as to the state of the property (other than the home) and the animals, was, however, ruled admissible on a balancing of the impropriety of the search under s 30 of the Evidence Act 2006 against those factors which favoured the admission of the evidence namely: the importance of the evidence to the prosecution case (it would have failed without it); the Balfours' lesser privacy interest in areas other than their home; and the fact that SPCA could have exercised a right of inspection under s 127 of the AWA, which, if invoked, would have made the search (except as it related to the presence of the TVNZ cameraman and the Balfours' home) legal.[12]

[7] An attempt by the Balfours to appeal to this Court out of time against the admissibility of the latter evidence was unsuccessful.[13] This Court also saw no merit in the proposed appeal.[14]

The District Court trial

[8] Judge Fraser, who conducted the Balfours' trial on the four representative charges, found them guilty on three of them on the basis of the evidence of the SPCA inspectors and four veterinary surgeons, which he accepted in preference to the evidence of the Balfours and their witness.[15] The Judge was satisfied that the Balfours had failed to ensure that the physical, health and behavioural needs of the

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9 The warrant was obtained under s 131 of the AWA. We note every police officer has the same powers and duties as an inspector: AWA, s 124(5).

10 Under s 133(c) of the AWA.

11 *R v Balfour* DC Palmerston North CRI-2007-010-136, 15 December 2009 [pre-trial ruling].

12 At [242]–[247]. Judge Garland treated this last factor as a "neutral" factor, but this Court has noted that its influence was (appropriately) in favour of admission: *Balfour v R* [2010] NZCA 465 at [17].

13 *Balfour v R*.

14 At [18].

15 Conviction decision at [305]–[320] (count 1); [116]–[122], [231]–[248], [274]–[288], [323]–[369] (count 2); [387]–[405] (count 4).

animals were met and that they had ill-treated the cats. The Judge accepted evidence describing the "generally filthy", "dirty" and "unhygienic" conditions and the "obvious lack of hygiene" on the Balfours' property.[16] A range of diseases were present in the cat population,[17] and the Judge accepted that cats were suffering from degrees of dehydration.[18] Ultimately, most of the cats and many of the dogs had to be destroyed.[19]

[9] In reaching his verdicts, Judge Fraser rejected the Balfours' defences that:[20]

(a) the Crown had failed to prove the charges beyond reasonable doubt;

(b) they had taken all reasonable steps to avoid harm to the animals;

(c) animals affected by disease at their property were under (adequate) treatment;

(d) disease was part of a natural cycle met by protection and rapid diagnosis; and

(e) if there was a definable standard of care, it was met and there was no breach.

The conviction appeals

[10] The Balfours now appeal against Judge Fraser's guilty verdicts on the following grounds:

(a) In the pre-trial ruling, Judge Garland erred in exercising the balancing test under s 30 of the Evidence Act and excluding only part of the inadmissible evidence obtained on the search of their property.

(b) In the conviction decision, Judge Fraser erred in interpreting the

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16 At for example [232], [245], [295] and [317]–[318].
17 At for example [189] and [322]. See below at [26].
18 At [116]–[118].
19 Conviction decision at [12]–[13].
20 At [18]–[22].

phrase "any significant injury or disease" in s 4 of the Act as not requiring that the disease be significant.

(c) Judge Fraser erred in determining that ss 10 and 12(a) of the Act did not require proof of injury or disease.

(d) Judge Fraser erred by applying an extended definition of "shelter" in s 4 of the Act.

(e) There was a breach of their rights under s 24(d) of the New Zealand Bill of Rights Act 1990 (the NZBORA) to have adequate time and facilities to prepare a defence.

(f) Representative charges were improperly used.

(g) The evidence of two SPCA experts (Dr Flint and Mr McLaren) should have been ruled inadmissible.

(h) The convictions were unsupported by the evidence.

(i) The conviction on count 4 was not sustainable because not one or more of the cats was or were specifically identified as being in distress.

[11] Before addressing each of these grounds in turn, it is convenient to summarise the purpose and scheme of the AWA, the relevant provisions of which are attached as an appendix to this judgment.

The Animal Welfare Act 1999

[12] The AWA is the single most important piece of legislation in New Zealand relating to the protection of all kinds of animals under human control.[21] It replaced earlier legislation, which had focussed principally on prohibiting cruelty to

[21] *Laws of New Zealand* Animals (online ed) at [1]; Neil Wells *Animal Law in New Zealand* (Thomson Reuters, Wellington, 2011) at [23.1]–[23.9].

animals,[22] with new provisions derived from internationally accepted principles known as the "Five Freedoms" of animal welfare, namely:[23]

(a) *Freedom from thirst* – by ready access to fresh water and a diet to maintain full health and vigour.

(b) *Freedom from discomfort* – by providing a suitable environment including shelter and a comfortable resting area.

(c) *Freedom from pain, injury and disease* – by prevention or rapid diagnosis and treatment.

(d) *Freedom to express normal behaviour* – by providing sufficient space, proper facilities and company of the animal's own kind.

(e) *Freedom from fear and distress* – by ensuring conditions which avoid mental suffering.

[13] The AWA imposes core obligations on persons responsible for the care of animals,[24] and provides for codes of welfare establishing minimum standards, and promoting best practice and appropriate behaviour.[25] As subpara (1)(a) of the AWA's long title states, there is a duty of care on owners of animals and persons in charge of animals to attend properly to the welfare of those animals.

[14] The particular purpose of pt 1 of the AWA is to require owners of animals, and persons in charge of animals:[26]

> ... to take all reasonable steps to ensure that the physical, health, and behavioural needs of the animals are met in accordance with both –
>
> (i) good practice; and
>
> (ii) scientific knowledge;

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22 Protection of Animals Act 1835 (UK); Cruelty to Animals Act 1878; Animals Protection Act 1960.

23 Neil Wells and Judith Nicholson "Five Plus Three: Legislating for the Five Freedoms and the Three Rs – Animal Welfare Act 1999 (New Zealand)" (2004) 32 ATLA 417.

24 Part 1.

25 Sections 68–79.

26 Section 9(2)(a).

The expression "the physical, health, and behavioural needs" of animals is defined in s 4. We refer to relevant aspects of that definition later in this judgment.

[15] This purpose is then implemented in pt 1 by s 10, which imposes a positive obligation on owners of animals, and every person in charge of animals, to ensure the physical, health, and behavioural needs of the animals are met in that manner, and by ss 12 and 13 which make it an offence of strict liability to fail to comply with that obligation. There is a statutory defence if the defendant can prove on the balance of probabilities that he or she took reasonable steps to comply with s 10, or the act or omission took place in circumstances of emergency, or that there was a relevant code of welfare in existence and the minimum standards of the code were in all respects met or exceeded.[27]

[16] Part 2 of the AWA then contains provisions prohibiting and allowing particular types of conduct in relation to species of animals or animals used for certain purposes.[28] Among the provisions in pt 2 is s 29(a) which makes it an offence for any person to ill-treat an animal.[29] The offence is also one of strict liability subject to a similar statutory defence.[30]

[17] Against this statutory framework, we now turn to the Balfours' specific grounds of appeal.

The pre-trial ruling

[18] For the Balfours, Mr Forster advances alternative, albeit inconsistent, submissions in support of the first ground of appeal:

(a) the breaches of s 21 of the NZBORA, which were relied on by Judge Garland to exclude part of the evidence obtained by the SPCA and police from their unlawful and unreasonable search of the Balfours' property, applied equally to the evidence ruled admissible;

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27 Section 13(2).
28 Section 27.
29 See by way of illustration: *R v Collins* [2008] NZCA 235; *Scobie v Ministry of Agriculture* HC Invercargill CRI-2003-425-7, 16 December 2003.
30 Section 30(2).

and/or

(b) the footage of the excluded TVNZ film should have been viewed in full because aspects of it were of value to the defence; and/or

(c) the seizure of all the cats on 5 March 2007 was both unlawful and unreasonable because there was an obligation on the SPCA to do a case by case assessment of each animal; and/or

(d) during the course of the trial it was revealed that the SPCA had re-entered the Balfour's property on 8 March 2007 without consent and outside the currency of the search warrant. This was new unlawfulness and unreasonable, favouring total exclusion of the evidence.

[19] There are short answers to these submissions. First, the Balfours sought leave from this Court to challenge Judge Garland's decision on grounds similar to those now advanced. This Court rejected them as without merit then for reasons with which we agree.[31] There is no new basis for revisiting those grounds.

[20] Second, having successfully obtained an order excluding the TVNZ footage, it is not now open to the Balfours to suggest that the footage should have been admitted in evidence. No allegation of counsel incompetence has been raised in respect of the approach adopted at the pre-trial hearing. There is no reason why Judge Garland should have been required to view the whole TVNZ film to decide whether aspects of it favoured the defence when it was the defence which was seeking its exclusion in full.

[21] Third, if following the pre-trial decision which resulted in the admissibility of some of the evidence obtained from the search, the Balfours had decided, on viewing the TVNZ film in full, that there were aspects of it that favoured the defence, it was open to them to seek to call the TVNZ cameraman to produce the film in evidence

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[31] *Balfour v R*, above n 12, at [18].

for their defence as relevant to an issue of consequence to the trial.[32] This ground of appeal is therefore not in fact a challenge to Judge Garland's decision. The Balfours' failure to seek to lead the TVNZ evidence in the course of their trial is not a reason for allowing the appeal. A miscarriage of justice is not established merely by showing that a reasonable tactical decision may have affected the outcome of the trial.[33]

[22] Fourth, the suggestion that the seizure of all the cats on 5 March 2007 was unlawful and unreasonable was made before Judge Garland.[34] It is not tenable in light of the fact that the surrender form for all of the cats was signed by both of the Balfours.[35] Further, if the alternative power of search under s 127 of the AWA had been invoked the inspectors would have had a statutory power to seize the cats.[36] In these circumstances, even if there had been no surrender of the cats, we do not consider the illegality would be significant enough to have led to a different conclusion on the exclusion of evidence than that reached by Judge Garland.

[23] Fifth, the suggestion that the evidence obtained on 8 March 2007 was without consent and outside the currency of the search warrant is another new argument about the legality of the search which was held unlawful by Judge Garland and was not raised at the trial.[37] More significantly, the date fields of the four charges in the indictment, even when amended, related principally to the period prior to the search.

[24] We therefore do not accept that this ground of appeal has been established.

Interpreting the phrase "any significant injury or disease"

[25] Under s 4 of the AWA, the expression "physical, health, and behavioural needs" includes:

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32 The scope of s 30 of the Evidence Act 2006 is limited to evidence offered by the prosecution. This is confirmed by s 31 of the Act.

33 *Rua v R* [2013] NZCA 304 at [30] citing *R v Scurrah* CA159/06, 12 September 2006 at [18]; *R v Collins*, above n 29, at [18]; *Prowse v Police* HC Hamilton CRI-2011-419-65, 15 December 2011 at [33]–[35]; *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [116].

34 Pre-trial ruling, above n 11, at [137].

35 At [130]–[134].

36 AWA, s 127(5). Compare s 133(1)(e).

37 Judge Garland noted the re-entry at [174] of his decision without further comment.

(e) protection from, and rapid diagnosis of, any significant injury or disease,—

being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

[26] Adopting a purposive approach to the interpretation of this definition,[38] and referring to the AWA's long title, Judge Fraser decided that the qualifier "significant" did not extend to the term "disease". At the same time, however, he was also satisfied that all of the diseases in the cats on the Balfours' property, evidence of which included severe conjunctivitis, rhinotracheitis, feline herpes, ringworm, panleukopenia and serious respiratory diseases and the diseases which the dogs were at risk of catching due to the state of their food preparation area, such as parovirus or E-coli were, with the possible exception of ringworm, "significant" in any event.[39]

[27] While Mr Forster does not dispute the Judge's finding that all of the diseases, with the possible exception of ringworm, were "significant" diseases, he nonetheless submits that the Judge erred in his interpretation of the s 4 definition because he did not consider s 9 of the AWA which is the purpose provision for pt 1, dealing with the care of animals, and which makes it clear that the concern is only with "unreasonable or unnecessary pain or distress". This indicates, he submits, that both "injury" and "disease" should be subject to the same standard and both must therefore be "significant" for the AWA to apply.

[28] We tend to agree with Mr Forster that s 9, together with ordinary rules of statutory interpretation,[40] support his submission that the qualifier "significant" probably should relate to both "injury" and "disease", but we do not consider that Judge Fraser's approach resulted in any error in this case. First, as in this case, most diseases affecting the cats or which could have affected the dogs are in any event

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38 Conviction decision, above n 1, at [52]–[58].

39 At [318] and [368].

40 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 232–246; FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 1225–1212.

likely to be "significant" in the sense that they are of consequence to the animal concerned and not merely transitory or trifling.[41] Second, Mr Forster's concession that, with the possible exception of ringworm, all the other diseases affecting the Balfours' animals were "significant", a concession consistent with the relevant expert veterinary evidence,[42] means that the animals were within the definition. Third, the presence of approximately a dozen cats suffering primarily from ringworm,[43] which might in any event be considered a "significant" disease,[44] does not undermine this conclusion because the existence of other "significant" diseases in the animals was sufficient to establish the charges.

Proof of injury or disease required?

[29] This ground of appeal arises because Judge Fraser found that there was no evidence of disease amongst the dog population.[45] Notwithstanding this finding, Judge Fraser was satisfied that the first charge was proved because:

(a) An offence under ss 10 and 12(a) of the AWA requires evidence that animals have not been protected from disease not evidence that disease has actually occurred.[46]

(b) Here the expert veterinary evidence and the evidence of the SPCA inspectors established that the dogs were not protected from disease.[47] The food preparation area, which is where ill-health starts, was found to be in "a filthy, contaminated and unhygienic state" on 5 March 2007 and the inference was drawn that it had been prior to that date.[48]

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41 See *R v McArthur* [1975] 1 NZLR 486 (SC). In John Simpson and others (eds) Oxford Dictionary (online ed, Oxford University Press) the definition of "significant" includes "consequential". It follows that "insignificant" includes "inconsequential".

42 Refer conviction decision at [368].

43 Although some were also assessed as dehydrated or emaciated.

44 Ringworm was described in evidence by Karen Woodley, one of the veterinary surgeons, as "quite debilitating".

45 Conviction decision at [317].

46 At [30] and [316].

47 At [307]–[311] and [314]–[318].

48 At [315].

[30] To support his submission that there must be evidence of actual disease, Mr Forster relies on the reference to the "rapid diagnosis of" any injury or disease in s 4 and on s 9(2)(b) which states that pt 1:

> (b) requires owners of ill or injured animals, and persons in charge of such animals, to ensure that the animals receive, where practicable, treatment that alleviates any unreasonable or unnecessary pain or distress from which the animals are suffering;

[31] We have no doubt that Judge Fraser was right to consider that ss 10 and 12(a) of the Act did not require proof of actual injury or disease. As already noted,[49] s 4 of the AWA refers to "protection from, and rapid diagnosis of, any significant injury or disease". The express reference to "protection from" shows clearly that the focus is on preventing the risk of injury or disease to animals in order to ensure that their "physical, health, and behavioural needs" are met. This interpretation is also consistent with the purpose of pt 1 of the AWA.[50]

[32] We do not accept Mr Forster's submissions to the contrary. His reliance on the reference in the s 4 definition to "the rapid diagnosis of" any significant injury, which does presuppose the existence of an injury or disease, overlooks the separate and discrete reference in the definition to "protection from" any significant injury or disease, which presupposes the absence of any such injury or disease. While diagnosis of an injury or disease may establish a failure to provide the requisite protection if the injury or disease could reasonably have been prevented, such a diagnosis is not an essential prerequisite to establishing a failure to protect animals from significant injury or disease. Proof, as here, of the real risk of disease from unhygienic food preparation areas is sufficient to establish a failure to provide the protection envisaged by the AWA.

[33] Similarly, Mr Forster's focus on the references in s 9(2)(b) to the AWA requiring owners of ill or injured animals to ensure that animals receive appropriate treatment, which does presuppose the existence of ill or injured animals, overlooks the separate and discrete reference in s 9(2)(a) to the AWA requiring owners to take all reasonable steps to ensure that "the physical, health, and behavioural needs" of

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[49] Above at [25].
[50] Section 9(2)(a).

the animals are met in accordance with both good practice and scientific knowledge. The reference in s 9(2)(a) to "the physical, health, and behavioural needs" of the animals is a reference back to the definition of that expression in s 4 and hence confirms that one of the purposes of the AWA is to "protect" animals from suffering any significant injury or disease in the first place. Owners of animals are to be obliged in accordance with good practice and scientific knowledge to ensure that their animals are not at risk of significant injury or disease.

Meaning of "adequate shelter"

[34] Under s 4 of the AWA, the term "physical, health, and behavioural needs" is defined as also including:

> (b) Adequate shelter:

[35] Judge Fraser found that the breach of the obligation to provide "adequate shelter" in respect of the cats was proved because:

> [245] For the reasons described by the experts in regards to the impact of unacceptable smell, a lack of ventilation in some areas, environments that are dirty and unhygienic where cats are exposed to risk of bacterial and viral disease, and diseased cats being housed with cats which did not have disease, it is an easy conclusion to reach that I can be sure this in no way met the physical, health and behavioural needs of the cats as to adequate shelter. None of Mr and Mrs Balfour's practices in these regards, accorded with good practice and scientific knowledge.

[36] Mr Forster submits that the Judge erred by using an extended definition of "adequate shelter" that included hygiene. Relying on a definition in the Oxford Dictionary,[51] Mr Forster submits that "shelter" means simply "anything serving as shield or protection from danger, bad weather etc".

[37] We agree with the Crown that in the context of the AWA "adequate shelter" is not limited to protection from the elements, but includes wider aspects of an animal's accommodation such as space, light, ventilation, and cleanliness. This approach to the meaning of the expression is in accordance with other definitions of the word "shelter", particularly in the context of the phrase "adequate shelter", and the

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[51] Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 1039.

overarching animal welfare protection purpose of the AWA which was enacted to implement the Five Freedoms.[52]

Breach of s 24(d) of the NZBORA?

[38] This ground of appeal arises because after the Crown had closed its case at the trial Judge Fraser allowed the Crown to amend the end date in the date fields of each charge in the indictment from 5 to 7 March 2007 to conform with the evidence that had been called.[53] Judge Fraser gave the Balfours an overnight adjournment to consider whether to have any Crown witnesses recalled for further cross-examination.

[39] Mr Forster submits that the overnight adjournment was inadequate, particularly as the following morning the Crown produced a schedule of dates and times when the photographs adduced as exhibits had been taken by the SPCA officers.[54] In support of this submission, Mr Forster relies on s 24(d) of the NZBORA which provides that everyone charged with an offence has a right to have adequate time and facilities to prepare their defence.[55] Mr Forster also seeks leave to adduce "fresh" evidence in the form of an affidavit from Mr Balfour. The affidavit disputes the dates and times of the SPCA photographs and exhibits communications with Cannon Australia concerning the function and behaviour of camera metadata. The affidavit also repeats the criticism of SPCA conduct and the inconsistency of the prosecution evidence with the TVNZ video footage.

[40] There are, however, a number of difficulties with Mr Forster's submission. First, he accepts that it was open to the Crown to seek to amend the indictment in this way and that the Judge was entitled to allow the Crown to do so.

[41] Second, there is no indication in the trial record that at the time the amendment was allowed or the next day when the schedule of dates was produced

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52 Sandra Newbury and others *Guidelines for Standards of Care in Animal Shelters* (Association of Shelter Veterinarians, Washington DC, 2010); Animal Welfare (Companion Cats) Code of Welfare 2007, Minimum Standards 4 and 5; and Animal Welfare (Dogs) Code of Welfare 2010, Minimum Standard 4. See conviction decision at [158].

53 *R v Balfour* DC Palmerston North CRI-2007-010-136, 11 October 2011 (Ruling No 2) at [25].

54 The data had apparently only recently been discovered. See below at [44].

55 *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [47]–[49].

the Balfours sought a longer adjournment. This on its own undermines the suggestion that the Balfours were given inadequate time to prepare their defence, especially as the Crown case had been presented over a period of some six months.

[42] Third, the Crown's application for the schedule of dates and times to be admitted in evidence was not opposed by the Balfours at the trial. Indeed the schedule was admitted by agreement under s 9 of the Evidence Act.[56] Mr Forster acknowledges that its admission "was not significantly opposed because it was helpful to the defence".

[43] Fourth, all five of the SPCA inspectors, four of whom had taken the photographs, were re-called and three were ultimately cross-examined at length about their photographs in light of the information in the schedule as to when they were taken.[57] The Balfours have not identified what more could have been asked of the witnesses if further time had been sought and allowed to examine the schedule.

[44] Finally, we agree with the Crown that the further affidavit evidence of Mr Balfour should not be admitted on appeal as it is not sufficiently cogent in the relevant sense in that there is no risk of a miscarriage of justice arising from its absence at trial.[58] The relevant Crown witness, Mr Boyd, conceded when he was recalled that the information about the timing of the photographs might always have been available, but said that he did not have the technical expertise to realise the data was stored in the cameras' memories and to access it.

[45] We therefore do not accept that this ground of appeal has been established.

Unfair use of representative charges?

[46] The question whether, at the relevant time, it was appropriate for the Crown to lay representative charges against the Balfours is governed by the decisions of the

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56 *R v Balfour* DC Palmerston North CRI-2007-010-136, 11 October 2011 (Ruling No 4).

57 Their further evidence extended over two days from the afternoon of 11 October 2011 until just after midday on 12 October 2011.

58 Court of Appeal (Criminal) Rules 2001, r 12B and *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63.

Supreme Court in *Qiu v R*[59] and *Mason v R*.[60] In the latter decision, after noting that under s 329(6) of the Crimes Act 1961 every count "shall in general apply only to a single transaction",[61] the Supreme Court said:

> [9] ... The qualification "in general" and the relatively indefinite word "transaction", which can encompass both a single event or a course of conduct, recognise the difficulty of application of any precise rule to the charging of the many different fact situations in which acts of offending may occur. They indicate the need for some flexibility. The essential requirement emerging from case law is that, if particular acts of alleged offending can sensibly be charged separately without undesirably lengthening the indictment (overcharging), then that should be done. It is necessary that distinctly identifiable acts of alleged offending be the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if they are combined in a single count. On the one hand, the use of a multiplicity of counts is to be avoided where fewer would suffice for the interests of justice. On the other, overly complex counts may prejudice the defence or make it difficult to frame fair and accurate directions to the jury. If necessary trial Judges should intervene if either problem arises.
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> [10] We repeat what Anderson J said for this Court in *R v Qiu*. The Court endorsed the practice of not charging as separate offences a continuing course of conduct which it would be artificial to characterise as separate offences. But the Court said that it was another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way, even if they relate to more than one act of a certain class or character. The Court added something which the present case vividly illustrates:
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> > Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of conviction, they assist the sentencing Judge by indicating the extent of culpability.

[47] Applying the approach of the Supreme Court to the charges in the present case, we consider that it was unnecessary to describe them as "representative". Each of the four charges in the indictment covered a course of conduct by the Balfours over a period of time relating to specific breaches of the AWA in respect of a maximum number of animals in each case and included detailed particulars. As Judge Fraser recognised in his sentencing decision,[62] these were standard charges under the AWA and it was unhelpful to describe them as "representative". The

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59 *Qiu v R* [2007] NZSC 51, [2008] 1 NZLR 1.

60 *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296.

61 Since 1 July 2013, s 20 of the Criminal Procedure Act 2011 has replaced s 329 of the Crimes Act 1961: Criminal Procedure Act, ss 2, 394 and 397–398 and Criminal Procedure Act Commencement Order 2013, cl 2.

62 Sentencing decision, above n 2, at [41].

particular incidents of alleged offending were in fact sensibly charged separately without undesirably lengthening the indictment by a multiplicity of charges.

[48] In these circumstances we do not consider that the unnecessary description of the charges as representative resulted in any unfairness to the Balfours. On the contrary, it would have been artificial and unfair to the Balfours to have characterised as separate offences each breach of the AWA in respect of each individual animal as Mr Forster submits was appropriate. The charges, which correctly related to courses of conduct, were not overly complex. There could be no real suggestion of prejudice to the defence when the trial Judge was in fact able to focus in his conviction decision on the relevant matters of fact and law and to assess the extent of the Balfours' culpability in his sentencing decision.

Expert evidence

[49] Expert veterinary evidence was called by the Crown and the Balfours at the trial. Such evidence is admissible if, in accordance with the requirements of the Evidence Act, it:

(a) is given by an expert, that is a person who has specialised knowledge or skill based on training, study or experience;[63]

(b) is based on the specialised knowledge or skill of the expert;[64] and

(c) is an opinion from which the fact-finder (the jury or the judge) is likely to obtain substantial help in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.[65]

[50] An expert witness giving evidence in a criminal proceeding should also comply with the requirements of the Code of Conduct for Expert Witnesses contained in sch 4 to the High Court Rules, particularly the overriding duty to assist

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63 Evidence Act, s 4.
64 Ibid.
65 Section 25(1).

the Court impartially.[66] Failure to comply with these requirements will not, however, necessarily result in the evidence being ruled inadmissible or in a miscarriage of justice. Expert evidence will not be inadmissible simply because the expert is associated with one of the parties, without any other indication that professional impartiality will not be maintained.[67] Furthermore, partiality is a matter that is likely to go to weight rather than to admissibility.[68] This will be particularly so in a judge-alone trial where the judge will be best placed to decide whether he or she is likely to obtain substantial help from the expert's opinion notwithstanding indications of witness partiality.

[51] At the Balfours' trial the Crown did not challenge the admissibility of the expert veterinary and animal behaviouralist evidence called for the Balfours. The experts stated that they had complied with and agreed to be bound by the requirements of the Code of Conduct.

[52] At the trial the Balfours did not suggest that the expert veterinary witnesses called for the Crown were not qualified as experts or that their evidence did not meet the Evidence Act definition of expert evidence. But the Balfours did challenge the admissibility of one of the Crown's experts, Dr Flint, on the ground of her alleged lack of impartiality. Although neither the challenge nor the Judge's ruling is recorded in the trial transcript, we were told that, after hearing argument and taking a short adjournment, Judge Fraser ruled that Dr Flint's evidence was admissible because lack of impartiality went to weight rather than to admissibility.

[53] On appeal the Balfours repeat their challenge to the admissibility of Dr Flint's evidence and also challenge the admissibility of the evidence of Mr McLaren, another veterinary surgeon called by the Crown.

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66 *R v Carter* (2005) 22 CRNZ 476 (CA) at [47]; *R v Hutton* [2008] NZCA 126 at [170]–[171]; and *Lisiate v R* [2013] NZCA 129 at [53]: leave to appeal refused *Lisiate v R* [2013] NZSC 80.

67 *Smith v Attorney-General* [2010] NZCA 258 at [40]; *Lisiate v R* at [55].

68 *M (CA438/2010) v R* [2011] NZCA 84 at [35].

Dr Flint

[54] In respect of Dr Flint's evidence, Mr Forster submits that, while lack of impartiality usually goes to weight, here Dr Flint was so lacking in independence it was obvious that the Judge would not obtain substantial help from her evidence as required by s 25 of the Evidence Act. The Judge therefore erred in failing to rule that her evidence was inadmissible.

[55] Mr Forster submits that Dr Flint's lack of impartiality was established by her evidence which showed that: she had watched inadmissible TVNZ film footage; she took no formal steps to confine herself to the admissible evidence before making conclusions and giving evidence; she had made a complaint to the Ministry of Agriculture and Fisheries (MAF) in 2004 about Mr Balfour's care of dogs; she originally tried to deny being the person who passed on information to MAF; she was reluctant to accept that information passed on to MAF was adverse to Mr Balfour; she said she was acting on instructions from the SPCA; she conceded she may have been passing on information to the SPCA before any charges were laid against the Balfours; and she made strong comments about Mr Balfour on a 20/20 TV current affairs show saying that he needed to be stopped and that she had treated dogs he had bred. Mr Forster submits that this evidence shows that Dr Flint was both an informant and an expert witness and that her opinions were not confined to properly admissible evidence.

[56] There are a number of difficulties with Mr Forster's submissions. First, as he accepts, lack of impartiality will usually go to weight rather than admissibility. To have an expert's evidence ruled inadmissible on this ground, it would be necessary to show that the expert was simply unable to maintain professional impartiality to such an extent that the judge or jury would be unlikely to obtain the substantial help required by s 25(1) of the Evidence Act.[69]

[57] Second, the evidence relied on by Mr Forster to establish Dr Flint's lack of impartiality was given under cross-examination and overlooked the evidence she

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[69] *M (CA438/10) v R* [2011] NZCA 84 at [35]–[36]; *Commissioner of Inland Revenue v BNZ Investments* [2009] NZCA 47, (2009) 19 PRNZ 553 at [22].

gave in re-examination which indicated that she would have reached the same conclusion notwithstanding having seen the TVNZ footage before it was ruled inadmissible and that her involvement with the Balfours' previous kennels and breeding operation and the 20/20 programme had occurred several years earlier. Read as a whole, Dr Flint's evidence does not demonstrate a level of bias or partiality sufficient to have warranted its exclusion. The weight to be given to her evidence was rightly a matter for the Judge to determine.

[58] Third, Mr Forster accepts that the closing submissions of counsel at the trial did not make any further reference to the question of Dr Flint's alleged impartiality or to the Balfours' suggestion that her evidence should have been excluded or given little or no weight.

[59] Fourth, Judge Fraser in his conviction decision correctly recognised the need to consider all the expert evidence with care. The Judge said:

> [36] Much expert evidence was given in this case.
>
> [37] Expert evidence for the Crown was given by Dr Flint (Veterinary Surgeon), Mr McLaren (Veterinary Surgeon) and Ms Johnston (Veterinary Surgeon).
>
> [38] Expert evidence for the defence was given by Ms Phillips (Veterinary Surgeon), Mr Hutton (Dog Behaviouralist) and Mr Harbord (Dog Behaviouralist and Breeder).
>
> [39] I have reminded myself as I have assessed that evidence that this is not a trial by expert. What insight or importance I gave to it and whether I accept it at all sits within the context of all the evidence I have heard.

[60] Finally, there is no indication in the Judge's comprehensive conviction decision that he failed in any way to assess and weigh all the relevant evidence properly.

Mr McLaren

[61] In respect of Mr McLaren's evidence, Mr Forster submits that it was inadmissible on the ground that Mr McLaren had refused to disclose his notes on the cats taken from the Balfours' property which he had examined. Mr Forster submits that this was "a flagrant breach of disclosure" which precluded any

cross-examination as to the accuracy of Mr McLaren's recollections four years later. The Judge ought to have "at least considered" ruling Mr McLaren's evidence inadmissible or even irrelevant when assessing its weight.

[62] Again, there are a number of difficulties with Mr Forster's submissions. First, while Mr McLaren was cross-examined at the trial about his notes, he was not in fact asked to produce them. During the course of his first day giving evidence, he was asked if he had a file that would record the day on which the cats were brought into his clinic. He replied that he did not have it with him. There was no request that he produce his file.

[63] Mr McLaren was subsequently asked on the same day whether he had a file "in relation to [his] involvement with examination of Balfour animals". He replied:

> I'd have to, I'm not sure that I have, no it was, I deal with thousands of animals a year, I, when I finish an animal then the file's finished, that's it and the SPCA and recorded this and I'm happy to go along with what they've presented for me.

Again there was no request that he search for his file.

[64] Then when Mr McLaren returned to continue his cross-examination the next day the following exchange occurred:

> Q. Mr McLaren I see you've got some more material with you here today, have you brought your file?
>
> A. No I didn't bring the file.
>
> Q. Do you have a file?
>
> A. I probably do have some records of that four years ago but this morning I was up at 6 o'clock scanning mares and catching up with some of the other work so I did not go through my surgery and look for files.

Once again there was no request that he produce his file.

[65] Second, in the absence of any request to Mr McLaren that he search for and produce his file, or any application to the Judge that Mr McLaren be directed to produce his file, it is an overstatement to suggest that Mr McLaren had "refused to

disclose his notes". There is no evidence of "a flagrant breach of disclosure" on the part of Mr McLaren.

[66] Third, in the absence of any request for production of the notes, any refusal of disclosure, or any submission by trial counsel for the Balfours that they had been disadvantaged in their defence by non-disclosure, there was no basis for the Judge to consider ruling Mr McLaren's evidence inadmissible. The Judge was entitled to give Mr McLaren's evidence such weight as he considered appropriate.

[67] We therefore do not accept that this ground of appeal is established.

Verdicts unsupported by the evidence?

[68] Next the Balfours challenge their convictions on the ground that Judge Fraser's verdicts on the three charges were not supported by the evidence. Detailed written submissions were presented by Mr Forster to support suggestions that the Judge had erred in:

(a) wrongly attributing to Mr Balfour that he had said that the scenes on his property were "staged" by the SPCA;

(b) wrongly attributing material to defence witnesses that Mr Balfour had not given water to dead animals;

(c) failing to deal with SPCA credibility/reliability issues;

(d) making specific mistakes in relation to the evidence; and

(e) failing to mention vaccination.

[69] This ground of appeal relies on s 385(1)(a) of the Crimes Act 1961 which provides that this Court must allow an appeal against conviction if it is of the opinion "[t]hat the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". While this provision refers to

the verdict of "the jury", it is established that the same test applies to verdicts in judge-alone trials.[70] In respect of appeals to which the Criminal Procedure Act 2011 applies, there will be different tests for appeals against verdicts following jury and judge-alone trials.[71]

[70] The correct approach to the application of s 385(1)(a) of the Crimes Act has been settled by the Supreme Court in *R v Owen*[72] when it endorsed the following aspects of this Court's decision in *R v Munro*:[73]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[71] Overall the Supreme Court held that a verdict will be unreasonable "where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt".[74]

[72] The question whether the approach to s 385(1)(a) settled by the Supreme Court in *R v Owen* should be different when the appeal is against verdicts following a judge-alone trial and the judge has, as here, given relatively full reasons for his

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70 *R v Slavich* [2009] NZCA 188 at [30]; *Wenzel v R* [2010] NZCA 501 at [39].
71 Criminal Procedure Act, s 232(2)(a) and (b).
72 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13].
73 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.
74 At [14]–[15].

verdicts, has not been settled definitively by this Court.[75] In these circumstances, and bearing in mind that the question was not argued before us, we propose to follow the course taken by this Court in *R v Slavich* and accept that in determining whether the Judge's verdicts were unreasonable we should examine the reasons he gave for them. This does not involve retrying the Balfours on the facts or disregarding the advantages the trial Judge had in assessing the credibility and reliability of witnesses, especially in a case such as this where the trial took 30 days spread over a period of some six months. It simply involves taking advantage of the fact that in this case the Judge has given reasons for his verdicts in a full decision. In carrying out our examination of the Judge's reasons for his verdicts we are also only required to focus on the specific respects in which the Balfours claim the verdicts were unreasonable.

[73] The starting point is to recognise that before and during the trial the Judge heard evidence from four veterinary surgeons and five SPCA officers for the Crown, and Mr and Mrs Balfour and 14 other witnesses, including one veterinary surgeon, for the defence. The transcript of the evidence runs to over 2,600 pages. The Judge also had the benefit of full written submissions from the Crown and the defence, which in both cases included detailed references to the evidence at the trial. The written submissions were supplemented by oral submissions.

[74] Some six weeks after the conclusion of the trial, the Judge delivered his verdicts and reasons in a decision comprising 410 paragraphs. It is a comprehensive decision set out under headings addressing, first: the nature of the trial and charges; the factual background; the Judge's approach; and the legislation; and then, in relation to each count and each s 4 need alleged to have been breached (in respect of the ss 10 and 12(a) charges): the Crown position; the defence position; the legal elements of the offences; evidential directions; particular legal issues and the Judge's conclusions on the legal issues; assessment of the evidence; and findings in relation to each need and each charge.

[75] Under the heading "The Approach" the Judge said:

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[75] Compare *R v Slavich*, above n 70, at [30]–[35]; *Gollan v R* [2013] NZCA 29 at [4]–[5], [42] and [63]; *Ludlow v R* [2013] NZCA 83 at [37]–[39]; *Jeffries v R* [2013] NZCA 188 at [90]–[96]; and *Johnstone v R* [2013] NZCA 214 at [20]–[21], [44] and [49].

> [23] I preface my decision by indicating that wherever possible I have given short reasons only for my conclusions in accordance with the principles of *R v Connell* (1985 2 NZLR 233, as in that case at page 237 Cooke J said:
>
> > Further, what the Judge sitting alone delivers is intended to be a verdict. It need not be supported by elaborate reasons. To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicate the criminal process to a degree which parliament cannot have contemplated. There are cases where a point of argument is of such importance that a Judges failure to deal expressly with it in his reasons will lead this Court to hold that there has been a miscarriage of Justice. A demonstrably faulty chain of reasoning may be put in the same category. But it is important that the decision to convict or acquit should be made without much delay. Careful consideration is an elementary need, but not long exposition.
>
> [24] I have followed the guidance given by Cooke J, and have endeavoured to give short reasons for my conclusions.
>
> [25] This is a case which turns on issues of fact and the credibility of witnesses, and essentially the findings that I make are findings of credibility. In making those findings, given the voluminous evidence I will not necessarily refer in detail to the evidence of the witnesses.
>
> [26] I remind myself that the initial burden of proof on all counts is upon the prosecution and that the standard of proof is beyond reasonable doubt. The defence have asserted statutory and common law defences. I remind myself that the burden of proof where a defence is asserted is on the balance of probabilities.

[76] The Judge's approach was entirely appropriate and, not surprisingly, the Balfours did not challenge any aspect of it. While the Judge said that he would give only "short reasons" for his conclusions, he in fact still managed to give relatively detailed summaries of the relevant evidence in relation to each issue under each charge and the reasons why, in respect of the charges he found proved, he preferred the evidence for the prosecution. As the headings to his decision show, he adopted a careful and considered approach to the issues and explained his assessment and evaluation of the relevant evidence. This is also shown by the fact that he acquitted the Balfours on the third charge and found breaches of the Balfours' obligations to meet three of the four needs under the first charge not proved.

[77] Focussing on the three charges that the Judge found proved, we are satisfied that there was ample evidence, which is correctly summarised in the Judge's

reasons for his verdicts, to support the verdicts. In each case the Judge has summarised the Crown case and relevant evidence as well as the relevant evidence for the defence before reaching his conclusions.

[78] By way of example we take the second charge and the allegation of failing to provide the cats with proper and sufficient food and water. The Judge expressly found the evidence of the SPCA inspectors credible and reliable as to what they all observed with respect to the provision of water for cats confirmed by the initial screen for dehydration.[76] After summarising the detailed evidence of the SPCA inspectors relating to their determination of dehydration and the expert evidence of Dr Flint and Mr Johnston (veterinary surgeons) and deciding that evidence showing only one cat was formally determined to be dehydrated in context did not detract from but rather added to the SPCA inspectors' findings,[77] the Judge recorded that he accepted the expertise of the SPCA inspectors and that the combination of their expertise and observations as to the water availability for the cats satisfied him beyond reasonable doubt that there was not proper and sufficient water available.[78]

[79] The Judge then addressed the defence case and said:

> [121] I reject the evidence of the defence that the cats had proper and sufficient water particularly bearing in mind Mr Balfour's evidence to Mr Boyd that he did not leave the cats with water overnight and that he was a bit behind on Monday tidying up the cats.
>
> [122] Mr Balfour's evidence was not credible as to what he said he meant by that when in his evidence he said he was relating this comment to the dead cats not having water bowls overnight before they died. That was not Mr Boyd or Ms Jackson's evidence. Even if I put this to one side, as a possible explanation for that comment, the fact that the inspectors cogent evidence as to lack of water along with photographic evidence of water bowls in some enclosures without water leaves me in no doubt that if the bowls were filled in the morning as Mr Balfour and Mr Moir said, they would not be empty within a space of approximately three hours.

[80] Turning to Mr Forster's specific submissions in relation to the Judge's reasons for finding this aspect of count 2 proved, we note first that, to the extent that they relate to the Judge's credibility findings, they are unsustainable because assessment of credibility of the witnesses was par excellence a matter for the trial

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76 Conviction decision, above n 1, at [116].
77 At [116]–[117] and [120].
78 At [118]–[120].

Judge. We do not accept Mr Forster's suggestion that in making his credibility findings in favour of the SPCA inspectors it was necessary for the Judge to address in his reasons each and every specific SPCA credibility point now raised by the Balfours, especially as they were not clearly raised by the defence submissions at trial. We agree with the Crown that the Judge's credibility findings and reasons are more than sufficient and properly based on the evidence adduced at the trial.

[81] Second, we reject Mr Forster's submission that the Judge was wrong to say that Mr Balfour had accepted he had not provided water to cats overnight "when he [Mr Balfour] said he had". It is true that under cross-examination Mr Balfour took issue with the evidence of Mr Boyd (an SPCA inspector and then team leader for National Investigations and Operations for the SPCA) that he (Mr Balfour) had told Mr Boyd that he (Mr Balfour) had left the cats without water overnight. But, as the Judge said, after hearing the evidence of both Mr Boyd and Mr Balfour, he accepted the evidence of Mr Boyd and found Mr Balfour's evidence "not credible". Those are specific credibility findings that the Judge was entitled and required to make and, in the absence of any other evidence, were entirely justified, especially as he made it clear that he would have reached the same conclusion even if he had put Mr Boyd's evidence on this point "to one side".

[82] Mr Forster's other specific submissions in support of this ground of appeal similarly do not withstand scrutiny. Mr Forster made much of the Judge's references to Mr and Mrs Balfour and their partner Mr Moir suggesting that the SPCA had "staged" the scenes on their property.[79] He contended that Judge Fraser wrongly attributed the words to the Balfours.

[83] Contrary to Mr Forster's contention, the notes of evidence of Mr Balfour's cross-examination record Mr Balfour as saying "...it was staged. I can't prove by whom but it's completely different from how I left it, there was only me, the SPCA personnel and their hangers on there, it is staged". Mrs Balfour, when asked by Crown counsel if she believed the scenes were staged, replied "I agree with [Mr Balfour] that none of us created the scenes that were seen in these photographs". We also agree with the Crown that the clear tenor of their evidence was that they

[79] At [198], [203], [213], [221], [224], [228], [234], [236] and [315].

believed the SPCA officers had altered scenes they found for the purpose of taking incriminating photographs and had also planted "ring-in" animals.[80] Judge Fraser's references to the Balfours' suggestion that the SPCA had "staged" the scenes were therefore fully justified.

[84] The three remaining specific submissions relating to alleged errors in the evidence and the failure to mention vaccination may be answered shortly. First, the Balfours' trial contention that the SPCA accepted that feral cats were included in the number of cats seized and processed is repeated. We see no reason to question Judge Fraser's conclusion that there was limited evidence of the presence of any feral cats on the Balfours' property.[81]

[85] Second, the Balfours challenge particular findings of fact: they contend some litter was not soiled and the location of some cats was different, and they dispute in particular the condition of one cat. The difficulties with these challenges are that they were "supported" by reference to the TVNZ video which was not in evidence at the trial, and there was in fact evidence before the Judge to support his findings. The submissions appear to be similar to the general contention, advanced and rejected at trial, that on 4 March 2007 "shelter was adequate as to space, lighting, stimulation and exercise and that all areas were cleaned".[82] Finally, the disputed matters do not appear determinative of liability, one way or the other.

[86] Third, Mr Forster submitted that Judge Fraser failed to take into account the Balfours' vaccination of the cats and the kittens in relation to the Balfours' obligation to protect the cats from, and rapidly diagnose, any significant injury or disease (count 2). Judge Fraser specifically accepted, however, that "cats and kittens were under treatment" but that was "not enough",[83] and that the Balfours had not taken all reasonable steps to prevent a breach of s 10.[84] We agree. Judge Fraser's conclusion that the Balfours breached this obligation was open on other evidence, such as that

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80 The appellants' notice of appeal accepts that accepted the description "staged" was accepted "on a number of occasions" when put by the Crown and contends that one dog and 13 cats were "ring-ins".

81 Conviction decision at [234].

82 At [133].

83 At [286].

84 At [370]–[372].

describing "filthy, dirty, fly infested, contaminated, smelly environments" occupied by the cats or the non-isolation of sick animals.

[87] We therefore do not accept that this ground of appeal is established.

Necessary to identify cats in distress specifically?

[88] Finally, the Balfours challenge their convictions on the fourth charge on the ground that the convictions were not sustainable because not one or more of the cats was or were specifically identified as being ill-treated.

[89] Count 4 alleged as a representative charge that the Balfours between 23 August 2006 and 7 August 2007 ill-treated animals, namely no more than 161 cats.

[90] Judge Fraser found this charge proved beyond reasonable doubt for the following reasons as summarised in his conviction decision:

> [401] Some examples of cats suffering distress can be found in the evidence of the experts Dr Flint and Mr McLaren. Their evidence was that where cats were exposed to high levels of ammonia concentration with their highly developed sense of smell this would cause them quite some distress. Both Dr Flint and Mr McLaren prefaced their comments by photographic identification for specific cat enclosures.
>
> [402] Dr Flint also gave evidence as to the effect on cats of the conditions where cats are housed in soiled, wet and smelly conditions. Her evidence was that not allowing cats to perform normal behaviour was likely to cause significant stress.
>
> [403] The evidence of Mr Boyd was that from his observations cats would be distressed living in environments that contained dirty litter boxes. Also if cats were unable to get water when they needed it they would be distressed.
>
> [404] Mr Balfour's own concession was that the kittens with panleukopenia were distressed.
>
> [405] I find the inference easily drawn from the proven facts and I am sure that some of the cats living in the conditions at Mr and Mrs Balfour's cattery would have been distressed.

[91] Mr Forster submits that the Judge erred in failing to identify which specific cat was distressed. He submits that the charge was not proven because a representative charge generally requires proof on at least one occasion. Each cat that

was distressed was capable of being individually identified, but no cat was so identified.

[92] Once again there are a number of difficulties with Mr Forster's submissions. First, there is no requirement for cats to be specifically identified in order to prove a charge for breach of s 29(a) of the AWA. The ultimate issue is whether there is sufficient evidence to show that a person has ill-treated "an animal". While in some cases specific animals are identified,[85] and this approach is desirable where possible, there is no reason in principle why the conclusion of a Judge that evidence establishes beyond reasonable doubt that several animals forming part of a group must have been ill-treated cannot support a conviction.[86]

[93] Second, the fact that Mr Balfour conceded in the course of his evidence in chief that the kittens with panleukopenia were distressed means that specific cats were identified for the purpose of this charge.

[94] Third, the Judge was right to draw the inference from the proven facts that some of the cats living in the conditions at the Balfours' cattery would have been distressed. The expert evidence of Dr Flint and Mr McLaren, together with the evidence of Mr Boyd as to his observations, provided a more than adequate basis for drawing this inference.

[95] We therefore do not accept that this ground of appeal is established.

The sentence appeals

[96] As already noted,[87] following their conviction on the three charges, the Balfours were sentenced by Judge Fraser to fines totalling $12,500 each, payable to the SPCA, and were disqualified from owning cats and dogs (other than their own

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85 See for example: *Scobie v Ministry of Agriculture*, above n 29; *R (Gray) v Aylesbury Crown Court* [2013] EWHC 500, [2013] 3 All ER 346 (HC).

86 See *R v Newell* (1887) 13 VLR 548 where a defendant was charged with a cruelty offence for failing to provide proper and sufficient shelter for his cattle.

87 Above at [2].

pets) for a period of 20 years. The Judge declined to discharge the Balfours without conviction.[88]

[97] The Balfours appeal against their sentences on the grounds that:

(a) the Judge's refusal to grant a discharge without conviction was in error because too high a test was applied, namely proof of actual adverse consequences, rather than a realistic appraisal of adverse consequences;

(b) the fines of $12,500 each were manifestly excessive, particularly having regard to the level of costs awarded and in comparison with the decision in *Kunicich v Royal Society for the Prevention of Cruelty to Animals*:[89] and

(c) there was no consideration of a lesser period of disqualification from owning animals taking into account the five years the Balfours had already been prohibited from owning animals under their bail conditions that applied from March 2007 until they were sentenced on 29 June 2012.

[98] A further ground of appeal, namely that the Judge had no authority to order that the fines be paid to the SPCA, was not pursued. It was accepted that the power to do so existed under s 171 of the AWA.

[99] We consider in turn each of the Balfours' grounds of appeal against their sentence.

Discharge without conviction?

[100] The Balfours' application for a discharge without conviction was made under s 106 of the Sentencing Act 2002. In considering whether to exercise the court's

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88 Sentencing decision, above n 2, at [1]–[19].

89 *Kunicich v Royal Society for the Prevention of Cruelty to Animals* HC Whangarei CRI-2008-488-67, 13 October 2009.

discretion under s 106 to grant the application, the court is precluded by s 107 from doing so "unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence". The correct approach to the application of these Sentencing Act provisions is explained by this Court in *Z (CA447/2012) v R*.[90] As Judge Fraser correctly said in his sentencing decision in this case:[91]

> Section 107 requires a balancing exercise when considering whether or not to exercise the discretion under s 106. Clearly s 107 considerations are a prerequisite to deciding whether or not to invoke s 106.

[101] Before carrying out the requisite balancing exercise, the Judge summarised the direct and indirect consequences of convictions for the Balfours as identified by their counsel and the factors relevant to the gravity of the offences.[92] The consequences identified by counsel for the Balfours were: the employment consequences of convictions; loss of reputation and consequential massive damage to their standing within the animal community; loss of accreditation to the New Zealand Kennel Club and the Cat Fanciers Incorporated Society which would prevent them from breeding cats and dogs; the loss of money spent on their property; including development costs of approximately $100,000; significant media criticism; and the renewing of death threats and hate mail.

[102] The factors relevant to the gravity of the offending identified by the Judge were: the significant number of cats involved and affected comprehensively; the lesser number of dogs found at risk; the serious impact on the animals and the range of offending against the cats (although it was acknowledged that the offending was not wilful); the not guilty pleas and the length of the trial; non-acceptance of the findings of the Court; and the significant potential penalties, including the possibility of incarceration. The Judge had "no doubt" that that this was serious offending of its type.[93]

[103] The Judge then carried out the balancing exercise saying:

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90 *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [21]–[28].
91 Sentencing decision at [7].
92 At [9]–[14].
93 At [11].

> [15] The next matter is to identify the direct and indirect consequences of conviction. That is, is there a real and appropriate risk that such consequences would occur? There is nothing that would confirm that you, Mrs Balfour, would likely lose your job. That simply remains a possibility. There is no evidence with respect to impact on your citizenship or residency application. There is no evidence from you, Mr Balfour, regarding an inability to secure employment following a conviction. The mere fact that charges have been proven and reported has had an impact. It is difficult to see how convictions would affect the position now.
>
> [16] Possible loss of accreditation is accepted, but in my view it is important that bodies such as the two referred should make decisions with the benefit of full disclosure of all of the facts. Consequential losses flowing from the lack of accreditation are acknowledged and are an inevitable consequence from this sort of offending. Loss of development costs is acknowledged. Again, that is an inevitable consequence of this sort of offending. Media criticism is likely to be rekindled. That is accepted.
>
> [17] Having said all of that I then have to determine whether the consequences of conviction are out of all proportion to the gravity of the offending. The words "out of all proportion" point to an extreme situation that speaks for itself and that what the Court must do is to balance all of the relevant public interest considerations as they apply in this case.
>
> [18] I have determined that this is not an extreme situation that speaks for itself, that is that the consequences of conviction are not out of all proportion to the gravity of the offending. This is serious offending of its type and whilst the consequences for you are not minor they follow the offending. The consequences are acknowledged but in my view are not out of proportion to the gravity of the offending. Reputational consequences exist now and will not be significantly impacted by conviction.
>
> [19] Accordingly, taking into account all of the factors that I have carefully set out in exercising my discretion I am not prepared to discharge you without conviction. There is significant public interest in this case. This offending is not in any way minor and there is no consequence that is out of all proportion. In balancing all of the relevant public interest considerations as they apply, the application for an s 106 discharge is denied.

[104] We do not accept Mr Forster's submission that in carrying out the balancing exercise the Judge erred in applying too high a test, namely proof of actual adverse consequences, rather than a realistic appraisal of adverse consequences. We agree with the Crown that the Judge correctly identified and applied the test of "a real and appreciable risk" that the consequences would occur.[94] Mr Forster did not identify any instances where the Judge was alleged to have applied the wrong test.

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[94] See *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222; *Iosefa v Police* HC Christchurch CRI-2005-409-64, 21 April 2005 at [34]; *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15 June 2007 at [20]; *Currie v Police* HC Auckland CRI-2008-404-307, 27 May 2009 at [49].

Manifestly excessive fines?

[105] The maximum penalties prescribed under the AWA for the three charges in respect of which the Balfours were convicted were at the time of their offending imprisonment for a term not exceeding six months or a fine not exceeding $25,000 or both.[95]

[106] In considering the appropriate sentence to impose on the Balfours, Judge Fraser referred to, but did not repeat, the relevant facts set out at length in his conviction decision.[96] He noted that the offending had occurred over a lengthy period and had involved in particular a substantial number of cats and kittens.[97] He accepted that, with respect to the dogs, failure to protect them from disease was the only adverse finding and that, while the Balfours' behaviour was not wilful, it fell "well short of the standards expected and regulated and that animals suffered".[98]

[107] The Judge referred next to the probation report which indicated remorse and, particularly on Mr Balfour's part, an acknowledgement that things had escalated into an uncontrollable situation.[99] The Judge noted that the Probation Service had recommended a sentence of community work.

[108] The Judge then referred to the Crown's submissions on the aggravating circumstances in the case. As he later adopted them,[100] it is convenient to set the Judge's summary out in full:

> [23] The Crown has made extensive submissions and in those submissions the Crown refers to what is described as the scale of offending in this case. The Crown says that in terms of companion animals, this was the largest operation ever conducted in New Zealand by the SPCA and the scale of the offending uncovered is unprecedented. The Crown says that there are no comparable cases in terms of scale, except cases involving farm animals. The Crown says that the aggravating factors here are the loss, damage and harm caused. The Crown refers to the large number of animals involved, the ways in which the animals suffered, the periods of time over which they suffered, the general conditions in which the animals were forced

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95 AWA, ss 25 and 37.
96 Sentencing decision at [20].
97 At [21].
98 At [21].
99 At [22].
100 At [32].

> to live, the diseased and health status of the animals and the dependence of the animals on yourselves.
>
> [24] The Crown says some of the cats had suffered and others were not being treated for conditions which, if they had been treated adequately, would not have resulted in the animals having to be put down. The Crown submits that the harm and suffering caused to the animals was serious.
>
> [25] The Crown also refers to you abusing your positions of trust and authority. That is you are the owners and breeders of the animals and you owed the animals a high duty of care. The Crown refers to the vulnerability of the animals and whilst under your control the Crown says that the animals were vulnerable. The Crown also makes reference to the ongoing poor treatment by omission over a period of some time.

[109] The Judge noted that the Crown had submitted that a fine was presumptively appropriate and should be in the range of $20,000 to $25,000.[101]

[110] The Judge then turned to the defence submissions which related to mitigating factors: a questioning of the number of animals involved and the fact that was inflated because of the need for them to be disease free for a period of some weeks; the making of a decision to preserve the lives of the animals at the expense of discomfort; that Mr Balfour worked extremely hard through that time; and that no dogs were identified as suffering.[102]

[111] The Judge noted that the defence had highlighted the fact that as at August 2006 the SPCA had had no concerns regarding the Balfours' animals and that not all of the alleged grounds of culpability were successful.[103] The Judge also noted defence submissions: as to the manner in which the Balfours had suffered in terms of publicity, claimed to have been courted by the SPCA; the damage to the Balfours' reputation as people previously well regarded as cat fanciers and dog breeders; the Balfours' massive personal economic loss, including loss of income and no return on investment; and that culpability was found simply because the Balfours did not do enough despite good intentions.[104]

[112] In determining sentence, the Judge gave the following reasons for imposing fines:

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101 At [26].
102 At [27].
103 At [28].
104 At [28]–[29].

> [32] In terms of sentencing factors it is necessary for the Court to make you accountable for the harm that you did to your animals which was substantial. Issues of reparation are relevant, and there is also the requirement for a sentence which denounces and deters behaviour which has a deleterious impact on animals. I have taken into account the least restrictive outcome and I adopt the Crown position as to the aggravating circumstances in this case.
>
> [33] As I have said, remorse, in mitigation, is acknowledged. I also unhesitatingly comment that both of you are people of good character.
>
> [34] Mr and Mrs Balfour, of its type, this was serious offending which had serious impact on your animals, in particular the cats. As humans we have some appreciation of their suffering for animals with heightened senses, what they endured does not bear thinking about.
>
> [35] I unreservedly accept that your behaviour was not wilful but came about as a consequence of circumstances. In essence you had far too many animals and insufficient resource in every sense. The effort was not enough. I accept immediately the impact that this offending has had on you. The loss of your business and reputation is substantial. It is unlikely either will be restored in the circumstances.
>
> [36] Acknowledging that cost, but recognising the real seriousness of what was going on here, I am going to deal with you by way of substantial fines. Given your health, Mr Balfour, it is possibly unlikely that you could undertake community work, in any event. The least restrictive option is a fine.

[113] In determining the amount of the fines to be imposed, the Judge said:

> [38] In terms of fines my starting point for you both was a fine in relation to count 1 of $3000 for both of you. That is $3000 each. In respect of counts 2 and 3, $6000 each on both counts. Giving you credit for your remorse and your previous good character, I would discount the fines to the following extent. Count 1, $2500 each. Counts 2 and 3, count 2 $5000 each, count 3 $5000 each.
>
> [39] I have determined from the statements of assets and liabilities that you both have the ability to pay those fines in less than five years which is probably at the outer end of the scale in terms of timeframe to pay fines. I am directing that the fines are to be paid in total to the NZSPCA.

[114] We have set out the sentencing submissions for the Crown and the Balfours and the Judge's reasons for imposing fines in some detail because we consider that the Judge's approach was entirely appropriate in this case and that, in light of the factual background summarised in his conviction decision and the Crown's submissions as to the aggravating circumstances, he was fully justified in imposing fines on the Balfours.

[115] Mr Forster did not submit that, in the event that the appeal against the refusal to discharge the Balfours without conviction was unsuccessful, fines were not the appropriate sentence. The challenge was simply to the amount of the fines, $12,500 each.

[116] We are not persuaded, however, that fines at that level were manifestly excessive. The Judge's unchallenged reasons for imposing fines on the Balfours fully justified starting points at the levels selected by the Judge, namely $3,000 each for count 1, which was not proved in full, and $6,000 each for counts 2 and 3, which were proved in full. The credits for remorse and good character which resulted in discounts to the starting points were also appropriate. There was no suggestion on appeal that the Balfours would not be able to pay the fines, as distinct from the costs, in less than five years as the Judge estimated.

[117] In reaching this conclusion we do not accept that the High Court decision in *Kunicich*,[105] relied on by Mr Forster, requires or supports a different outcome. *Kunichich* concerned an appeal against the District Court's imposition of a $15,000 fine imposed in respect of a single charge of wilful ill-treatment under s 28(1)(b) of the AWA. The High Court considered that the sentence was within the range available to the District Court, but noted that the appellant had been sentenced as a "first offender in good standing in the community" and that the District Court "erred, if anything, on the side of leniency".[106]

Lesser period of disqualification?

[118] Under s 169(1) of the AWA the court has a discretionary power to order persons convicted of offences under ss 12 and 29(a) to be disqualified from owning or exercising any authority in respect of any animal or animals of a particular kind. In the case of a first offence the court must also consider that by reason of the serious nature of the offence the person should be disqualified. Under s 169(2) the court may specify a minimum disqualification period. This Court has accepted that a sentencing Judge has "a wide discretion to impose a disqualification within the total

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105 *Kunicich v Royal Society for the Prevention of Cruelty to Animals*, above n 89.
106 At [70].

sentence, especially where he or she is satisfied that the term of disqualification is of a length necessary to meet the statutory principle of deterrence".[107]

[119] The Crown sought lifetime orders disqualifying the Balfours.[108]

[120] Defence counsel opposed such orders. They referred to the Balfours' bail conditions which had prevented them from owning animals, apart from four companion animals, for some five years, and submitted that, having regard to the Balfours' personal circumstances, the intrinsic seriousness and extenuating circumstances, a prohibition order beyond the five years already served would be a disproportionate response.[109]

[121] After referring to these submissions and after giving his reasons for imposing the fines, Judge Fraser said:

> [37] The seriousness of the offending, as submitted by the Crown, will also be recognised by an order disqualifying you both from being the owner of or exercising authority in respect of any cat or kitten, dog or puppy for 20 years with the following exception:
>
> (a) Any domestic cat or dog that you presently have you can retain and can replace.
>
> (b) Any animal is to be de-sexed and you will submit them for periodical inspections by the SPCA or the Ministry of Agriculture and Fisheries.
>
> (c) Any replacement animal is to be de-sexed.

[122] On appeal Mr Forster has repeated the submission made for the Balfours in the District Court that their bail conditions, which prevented them from owning animals for five years, ought to have been taken into account. In support of this submission he referred to the decision of this Court in *BB (CA732/2012) v R* where it was noted that bail restrictions were capable of justifying a sentence discount.[110]

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107 *R v Collins*, above n 29, at [98] citing *R v Albert* CA126/03, 19 December 2003 at [18]–[19].
108 Sentencing decision, above n 2, at [26].
109 At [29].
110 *BB (CA732/2012) v R* [2013] NZCA 139 at [15].

[123] For the Crown, Ms Edwards referred to the High Court decision in *Green v SPCA*[111] as a precedent supporting disqualification for a period of 25 years.

[124] We do not accept that Judge Fraser failed to take into account the five year period of de facto disqualification while the Balfours were on bail. He recorded the submission on their behalf that the time period meant that no further order for disqualification was warranted. In imposing a disqualification period of 20 years, the Judge clearly rejected that submission.

[125] Nor are we persuaded in any event that an effective period of 25 years was manifestly excessive. That was in fact the period imposed in *Green v SPCA* which also involved charges under s 12 of the AWA against an owner of dogs and cats for failing to meet her obligations under ss 10 and 11 of the AWA. There was no allegation of wilful ill-treatment of the animals and no commercial breeding operation in that case, but the conditions in which the animals were found were undoubtedly appalling. While in that case Cooper J described the sentence as "stern", he did not consider it passed the threshold of being clearly excessive when the degrading conditions in which the animals were collectively kept and their suffering were taken into account.[112]

[126] The Balfours' case involved significantly more cats and dogs than *Green* and a commercial breeding partnership. These factors meant, as the Crown submitted, that the 20 year period imposed by Judge Fraser was necessary to reflect the seriousness of the offending and to minimise the risk of the Balfours establishing a similar breeding operation in the future. The underlying problem for the Balfours is that, while they acknowledged that their operation involved poor conditions which adversely affected their animals to some extent, financial imperatives meant that they kept going when they clearly should have given up. In these circumstances the disqualification order imposed by the Judge was within the range open to him and cannot be described as manifestly excessive.

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111 *Green v SPCA* HC New Plymouth CRI-2006-443-12, 18 October 2006.

112 *Green v SPCA* at [19]. We note that in light of the combined effect of s 169(1) and 169(2) of the AWA (as amended by s 7 of the Animal Welfare Amendment Act 2010), Cooper J's comment than an indefinite disqualification is possible may no longer be accurate.

Costs appeal

[127] In his sentencing decision, Judge Fraser indicated that he intended to make an order for scale costs in favour of the Crown under the Costs in Criminal Cases Regulations.[113] Counsel were invited to reach agreement on the amount of costs. If they were unable to do so, the matter was to be referred back to the Judge.

[128] As agreement between counsel was not able to be reached, it was necessary for the Judge to consider an application by the Crown for:

(a) scale costs of $22,995 under the Costs in Criminal Cases Regulations;

(b) witnesses' fees, allowances and travel expenses of $4,823.08 under the Witnesses and Interpreters Fees Regulations; and

(c) all expenses reasonably incurred as a result of the exercise of the powers conferred by the AWA totalling $24,712.86, under s 173 of the AWA.

[129] Crown counsel filed memoranda in support of the application before the Judge's sentencing and costs decisions. In respect of the application for costs under the Costs in Criminal Cases Regulations, the Crown submitted that "given all the circumstances" it would be appropriate for costs to be paid by the Balfours towards the prosecution. It was claimed that the trial "became a case of special complexity due to the voluminous amount of evidence and time taken in trial, being over 2657 pages of transcript and taking over 30 Court days". Reference was made to the relevant provisions of the Costs in Criminal Cases Act 1967 (the CCC Act) and the decision of this Court in *New Zealand Police v Barr*.[114]

[130] Counsel for the Balfours filed memoranda opposing the application. Reference was made to: their successful defence of the third charge; the representative nature of the charges; and the fact that Mr Balfour was legally aided.

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113 Sentencing decision at [40]–[42].
114 *New Zealand Police v Barr* [2008] NZCA 124.

[131] In response, Crown counsel acknowledged that the representative charges may have added some complexity to the proceeding and that there were limits on the costs a legally aided party could be expected to pay. Reference was made to s 45 of the Legal Services Act 2011, which limits the circumstances in which an order for costs may be made in civil proceedings against a legally aided person.

[132] In his costs decision, Judge Fraser confirmed his sentencing decision indication and made orders for the Balfours to pay the Crown's scale costs associated with the substantive hearing under the Costs in Criminal Cases Regulations, including witnesses' fees, allowances and travel expenses prescribed by the Witnesses and Interpreters Fees Regulations.[115] The Crown's application under s 173 of the AWA for all expenses reasonably incurred under the AWA was declined.[116] The Crown has not appealed against that decision.

[133] In his costs decision, the Judge referred in passing to s 4 of the CCC Act,[117] but did not address the matters raised in the submissions for the Crown and the Balfours or explain why he decided to exercise the District Court's discretion under s 4(1) of the CCC Act in this case.

[134] A court has a discretionary power under s 4(1) of the CCC Act to order a convicted defendant to pay "such sum as it thinks just and reasonable" towards the costs of the prosecution. As the Supreme Court pointed out in *Barr v New Zealand Police*,[118] the Court must be satisfied that it has jurisdiction to exercise the discretionary power and that the residual discretion to order payment should be exercised in the circumstances of the particular case. Jurisdiction to exercise the power depends on the Court being satisfied that the payment of the sum is "just and reasonable" under s 4(1) and, in the case of disbursements, the costs were "properly incurred".[119]

[135] The need for the Court to be satisfied that the sum is "just and reasonable", together with the residual discretion involved in considering whether to make the

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115 Costs decision, above n 3, at [20] and [26]–[27].
116 At [25].
117 At [9].
118 *Barr v New Zealand Police* [2009] NZSC 109, [2010] 2 NZLR 1 at [22].
119 Costs in Criminal Cases Act 1967, s 2 definition of "costs".

order sought, means that the Court will need to take into account all the relevant circumstances of the particular case in order to ensure that justice is done. The relevant circumstances are likely to include factors such as: the nature of the charges; the complexity of the trial; the time spent on the case; the conduct of the parties; the extent of the success of the prosecution; the sentence imposed; the defendant's financial position; and whether the defendant was legally aided.[120] As Lord Bingham CJ said in *R v Northallerton Magistrates' Court, ex parte Dove*,[121] the purpose of a costs order of this nature is "to compensate the prosecutor and not to punish the defendant".

[136] In the Balfours' case it was therefore necessary for the Judge to consider whether the costs order sought by the Crown totalling $27,818.08 ought to have been made and to give some explanation for his decision.[122] In considering whether to make the order, it was necessary for the Judge to take into account:

(a) his view that the prosecutions were for standard charges and that for the prosecution to describe them as representative charges was, as the Crown acknowledged, unhelpful;[123]

(b) his view that, while the trial was lengthy, there was no special difficulty, complexity or inherently anything that was important in it;[124]

(c) the absence of any suggestion by the Crown that the Balfours, in exercising their rights to defend the charges, had improperly or unnecessarily contributed to the length of the trial;

(d) the fact that the Balfours were acquitted on the third charge and alleged breaches of their s 10 obligations in respect of three of the four needs under the first charge were found not proven;

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120 *R (Gray) v Aylesbury Crown Court*, above n 85, at [49] and [64]–[66].
121 *R v Northallerton Magistrates' Court, ex parte Dove* [2000] 1 Cr App R (S) 136 (CA) at 142.
122 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [16].
123 Sentencing decision, above n 2, at [41].
124 Ibid.

(e) the imposition of the fines of $12,500 each and the period of disqualification, bearing in mind that as a general rule costs in criminal cases should not be grossly disproportionate to a fine or fines;[125] and

(f) the absence of any suggestion that the Balfours would have any ability to pay the costs, bearing in mind the period of disqualification, the Judge's recognition of their limited ability to pay the fines,[126] and, as the Crown acknowledged, the fact that Mr Balfour was on legal aid.

[137] As the Judge gave no explanation for his costs decision, it appears that he may not have taken any of these matters into account in deciding to make the order under s 4(1) of the CCC Act. We therefore accept that the Judge erred in ordering the Balfours to pay the costs of the prosecution in this case. In our view, taking into account these matters, especially on a cumulative basis, we are not satisfied that the payment of $27,818.08 the Judge ordered was "just and reasonable" in the circumstances of this case. In our view it was not open to the Judge to exercise the residual discretion under s 4(1). We therefore conclude that the appeal against the orders for costs must be allowed and the orders made in the District Court set aside.

Result

[138] For the reasons we have given:

(a) The application by the Balfours for leave to adduce further evidence on appeal is declined.

(b) The appeals against conviction and sentence are dismissed.

(c) The appeal against the orders for costs is allowed and the orders made in the District Court under the Costs in Criminal Cases Regulations 1987 and the Witnesses and Interpreters Fees Regulations 1974 are set aside.

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125 *R (Gray) v Aylesbury Crown Court*, above n 85, at [64].
126 Sentencing decision at [39].

Solicitors:
Crown Law Office, Wellington for Respondent

APPENDIX ONE: ANIMAL WELFARE ACT 1999 – KEY PROVISIONS

An Act

(a) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,-

- **(i) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:**
- **(ii) to specify conduct that is or is not permissible in relation to any animal or class of animals:**
- **(iii) to provide a process for approving the use of animals in research, testing, and teaching.**
- **(iv) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee.**
- **(v) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct:**

(b) to repeal the Animals Protection Act 1960.

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4 Definition of physical, health, and behavioural needs

In this Act, unless the context otherwise requires, the term physical, health, and behavioural needs, in relation to an animal, includes—

(a) proper and sufficient food and water:
(b) adequate shelter:
(c) opportunity to display normal patterns of behaviour:
(d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:
(e) protection from, and rapid diagnosis of, any significant injury or disease,—

being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

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9 Purpose

(1) The purpose of this Part is to ensure that owners of animals and persons in charge of animals attend properly to the welfare of those animals.
(2) This Part accordingly—
  - (a) Requires owners of animals, and persons in charge of animals, to take all reasonable steps to ensure that the physical, health, and behavioural needs of the animals are met in accordance with both
    - (i) Good practice; and
    - (ii) Scientific knowledge; and
  - (b) Requires owners of ill or injured animals, and persons in charge of such animals, to ensure that the animals receive, where practicable, treatment that alleviates any unreasonable or unnecessary pain or distress from which the animals are suffering; and
  - (c) Imposes restrictions on the carrying out of surgical procedures on animals; and
  - (d) Provides for the classification of the types of surgical procedures that may be performed on animals; and

(e) Specifies the persons or classes of persons who may perform each class of such surgical procedures; and

(f) Specifies certain minimum conditions that must be observed in relation to the transportation of animals.

10 Obligation in relation to physical, health, and behavioural needs of animals

The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—

(a) good practice; and

(b) scientific knowledge.

12 Animal welfare offences

A person commits an offence who, being the owner of, or a person in charge of, an animal,—

(a) fails to comply, in relation to the animal, with section 10; or

(b) fails, in the case of an animal that is ill or injured, to comply, in relation to the animal, with section 11; or

(c) kills the animal in such a manner that the animal suffers unreasonable or unnecessary pain or distress.

13 Strict liability

(1) In a prosecution for an offence against section 12, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

(1A) In a prosecution for an offence against section 12 committed after the commencement of this subsection, evidence that a relevant code of welfare was in existence at the time of the alleged offence and that a relevant minimum standard established by that code was not complied with is rebuttable evidence that the person charged with the offence failed to comply with, or contravened, the provision of this Act to which the offence relates.

(2) Subject to subsection (3), it is a defence in any prosecution for an offence against section 12 if the defendant proves—

(a) That, in relation to the animal to which the prosecution relates, the defendant took,—

(i) In the case of an offence against section 12(a), all reasonable steps to comply with section 10; or

(ii) In the case of an offence against section 12(b), all reasonable steps to comply with section 11; or

(iii) In the case of an offence against section 12(c), all reasonable steps not to commit a breach of section 12(c); or

(b) That the act or omission constituting the offence took place in circumstances of stress or emergency, and was necessary for the preservation, protection, or maintenance of human life; or

(c) That there was in existence at the time of the alleged offence a relevant code of welfare and that the minimum standards established by the code of welfare were in all respects equalled or exceeded

...

29 Further offences

A person commits an offence who—

(a) ill-treats an animal; or

...

30 Strict liability

(1) In a prosecution for an offence against section 29(a), it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

(1A) In a prosecution for an offence against section 29(a) committed after the commencement of this subsection, evidence that a relevant code of welfare was in existence at the time of the alleged offence and that a relevant minimum standard established by that code was not complied with is rebuttable evidence that the person charged with the offence contravened section 29(a).

(2) Subject to subsection (3), it is a defence in any prosecution for an offence against section 29(a) if the defendant proves—

(a) That, in relation to the animal to which the prosecution relates, the defendant took all reasonable steps not to commit a breach of section 29(a); or

(b) That the act or omission constituting the offence took place in circumstances of stress or emergency, and was necessary for the preservation, protection, or maintenance of human life; or

(c) That there was in existence at the time of the alleged offence a relevant code of welfare and that the minimum standards established by the code of welfare were in all respects equalled or exceeded....