

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2016-090-003589
[2017] NZDC 16889**

THE QUEEN

v

TATJANA VASILYEVNA YOUNG

Hearing: 2 August 2017
Appearances: D Collins for the Crown
C La Hatte for the Defendant
Judgment: 2 August 2017

NOTES OF JUDGE A J JOHNS ON SENTENCING

[1] Ms Young was found guilty after a Judge alone trial before me of one charge of contravening s 239 Local Government Act 2002. I found that between 23 December 2015 and 28 June 2016 that she breached the Auckland City Council Animal Management Bylaw 2015 as the owner of cats present at [address deleted], Massey, which caused a nuisance to neighbours due to the odours and noises emitted by the cats.

[2] I have given a full written decision canvassing all the witnesses and the evidence I heard and I do not propose to transverse the facts in any detail but very briefly, Ms Young came into possession of Bengal cats sometime around 2012/2013. She was breeding the cats and it became apparent these cats emitted strong smelling urine, particular during breeding times.

[3] The enclosures Ms Young kept the male cats in were housed on borders with two of the complainants and another neighbour who were affected by these odours and also the noise the cats made. When the male cats in call to the female cats when they are on heat, the noise is extremely piercing and was described by a number of the witnesses as sounding, for instance, like a child being hurt. It was those matters and the ongoing nature of the problem that led me to conclude that the Crown had proved their case to the appropriate standard.

[4] In relation to sentencing when the matter first came before me the Council were asking the Court to impose orders under s 33 Health Act 1956, in particular to order Ms Young be required to abate the nuisance effectively to prohibit the recurrence of the nuisance, and to specify the work to be done in order to abate the nuisance and/ or prevent its reoccurrence.

[5] Mr La Hatte challenged the jurisdiction of the Court to impose orders under s 33 Health Act 1956 because Ms Young was prosecuted under Local Government Act 2002 and it prescribes its own penalties, which is a maximum fine of up to \$20,000. He submits that because this was a prosecution under Local Government Act 2002, there is no provision in that Act or any of the rules to allow the Court to then use the provisions of s 33 Health Act 1956. In relation to that matter the counsel for the Council submits that creation of a nuisance under s 29 Health Act 1956 which I found means that I can make an order under s 3 of the same Act for abatement of the nuisance and he submitted that the implementation of the Bylaw in 2015 envisaged that s 33 could be used under the Local Government Act.

[6] I was referred to *Edwards v Manukau City Council* where the appellant was convicted of creating a nuisance under s 29 Health Act 1956. The appellant was fined and orders were made under s 3 of the Act requiring abatement of the nuisance. As I said, the Councils submissions are that the Local Government Act and the Health Act have adopted the Bylaw and that the Bylaw, as I said, envisages that the council can avail itself with remedies under both statutes where a breach occurs. Mr La Hatte's submission is that I have no power beyond the sentencing prescribed in this specific legislation under which he was prosecuted. The Council is unable to provide any cases

to the Court where s 33 Health Act has been used when there has been a successful prosecution under the Local Government Act.

[7] My view is that it is not for the Court to decide what the Bylaw envisages but to apply the penalties as prescribed under the legislation that the defendant was prosecuted under. She was not prosecuted under the Health Act, she could have been but the Council chose to prosecute her under the Local Government Act. I cannot accept the Counsel argument that the Court has power to make the orders sought under s 33 Health Act.

[8] In relation to an alternative remedy, under s 162 Local Government Act I can put in place an injunction restraining the commission of the offence and any breaches of the Bylaw. Section 162 says

“A District Court may, on application of a local authority, grant an injunction restraining a person for committing a breach for bylaw or offence against the Act and the injunction may be granted under ss (1) despite anything and any other enactment whether or not proceedings in relation to the breach or the offence have been commenced, if a person is convicted of the breach or of offence the injunction can be imposed and substitution for or in addition to any other penalty.”

[9] The information that Mr La Hatte has provided, (and can I note here that Mr La Hatte has appeared pro bono and he has been of great assistance to the Court), that the SPCA has visited the property in May of this year. At that point there were four adult Bengal cats sighted, one male and three female, and five kittens. The SPCA inspector reported there were no health concerns, all the cats were in normal body condition, they were well handled and friendly and good thought had been put into behavioural enrichment. He or she described the environment as very clean, there was no odour noted or any welfare concerns.

[10] I have no doubt that Ms Young is passionate about her cats, that was clear, and they form an enormous part of her day-to-day life. Against that however, I have to take into account the fact that the nuisance has been ongoing for some years and that it has had significant impact, particularly on the very close neighbours. It has

disrupted sleep, the level of urine odour caused health reactions and family members moved out of one of the neighbour's homes because they could not live with the noises of the cats.

[11] As I said in my decision I actually listened to the recordings taken on [a complainant]'s property, who is one of the significant complainants, and the noise is extremely loud and piercing and it was occurring during night hours way above any permissible decibel level.

[12] My view is that Ms Young is still continuing to operate her breeding operation out of her address at [address deleted]. My view is that the Council are entitled to bring this to an end and the only way I can do that is to grant an injunction under s 162 Local Government Act 2002 and I propose to do that.

[13] I mentioned Ms Young's love of her cats because the conditions of the injunction I intend to impose will mean that she can no longer breed cats, that she is not to be in possession of any male cats and any female cats are to be neutered. As I say, that will be a significant penalty to her and I need to then temper the fine and costs sought by the Crown because of the injunction I propose to grant.

[14] The Counsel in their submissions has suggested a starting point of a fine of \$15,000 with a small discount for her lack of previous convictions. They seek costs of \$2,223 and reparation to some of the complainants totalling \$1050. [Personal and financial details deleted].

[15] Her means are modest and whilst I acknowledge the aggravating features highlighted by the Council in their submissions, that is the duration of the offending, the affect it had on the various neighbours and the fact that the Council worked tirelessly to try and resolve the matter without resulting to a prosecution, the penalty under the section that Ms Young was prosecuted under up until recently had a maximum penalty of \$500 and that has obviously been increased to \$20,000. The Council in their submissions referred the Court to some cases where different fines have been imposed for different types of breach of the Local Government Act and Health Act. The counsel referred to *Parlane v Waipau District Council*, an appeal

against six convictions for contravention of a Bylaw and one charge of obstructing an officer. The convictions related to lighting outdoor fires on several occasions, two of which were deemed to cause a nuisance due to smoke emissions entering neighbouring properties. At that point the maximum fine was \$500 each.

[16] The sentencing Judge took into account the calculated strategy of defiance and concluded he was acting in full knowledge that enforcement action would result. The appeal was dismissed and the fines relating to the six fires of \$1600 were upheld together with solicitor's costs of \$2000. The obstruction charge was quashed together with the associated fine.

[17] *Edwards v City Council* was an appeal against convictions under Health Act and Noise Control Act 1982 which has since been repealed. The charges related to a noisy kitchen extractor fan that caused a noise nuisance of an intrusive tone or character. The fan ran from early morning to mid evening. The sentencing Judge imposed fines of \$3,400 plus solicitor's costs of \$1380 and the appeal was dismissed.

[18] They also referred to the *Waikato Regional Council v McKintyre*. Here the defendant pleaded guilty to three charges under Resource Management Act 1991, one of which was permitting the discharge of odour from his piggery on 31 January 2007. Two other charges related to discharge of pig farm effluent onto land. In relation to the odour it was described by Council staff as so strong that it caused the lips and tongue to tingle, left a metallic taste in one's mouth and made one's eyes run.

[19] The Judge adopted a global starting point of \$16,000 to reflect both the odour charges which related to a single day. The third charge related to discharging pig effluent. It was a continuing offence and a starting point of \$11,000 was adopted. The maximum fine under Resource Management Act 1991 is \$300,000.

[20] My view is that notwithstanding the aggravating features here, the level of fines sought by the Council is far too high and taking into account the fact that I propose to grant the injunction, my view is a fine and costs of substantially less is warranted.

[21] In all of the circumstances Ms Young is now convicted and fined \$2000. She is ordered to pay costs towards the prosecution of \$1000. I am not going to impose emotional harm reparation because of the injunction.

[22] So I now make an injunction pursuant to s 162 Local Government Act 2002. The order I make is that all male cats and kittens are to be removed from the property within 28 days of today's date. Any female cats or kittens that remain in the care of Ms Young must be neutered within 28 days of today's date. There is to be no further breeding of Bengal cats at Ms Young's property at [address deleted] in Massey and lastly, all enclosures that were housing the male breeding cats located outside her dwelling are to be removed within 28 days.

A J Johns
District Court Judge