IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW & APPEALS LIST

Not Restricted

S CI 2013 6020

TANIA ISBESTER — Plaintiff

v

KNOX CITY COUNCIL — Defendant

JUDGE:	EMERTON J
WHERE HELD:	Melbourne
DATE OF HEARING:	20-21, 24, 26-27 February and 7 March 2014
DATE OF JUDGMENT:	17 June 2014
CASE MAY BE CITED AS:	Isbester v Knox City Council
MEDIUM NEUTRAL CITATION:	[2014] VSC 286

ADMINISTRATIVE LAW – Judicial review – Decision of the Council to destroy a dog following a series of attacks – Whether the decision affected by apprehended bias and bad faith - Whether the Council denied the plaintiff procedural fairness – Whether the reasons for decision are inadequate– Whether the Council's decision to destroy the dog was manifestly unreasonable – Proceeding dismissed - *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 - *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 - *Gubbins v Wyndham City Council* (2004) 9 VR 620 - *McGovern v Ku-Ring-Gai Council* (2008) 72 NSWLR 504 - *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605 - *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 – ss 29(4) and 84P of the *Domestic Animals Act 1994* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Kendall QC Ms J Taylor	Phoenix Legal Solutions
For the Defendant	Mr R Knowles	Maddocks

HER HONOUR:

Introduction

1 The plaintiff has brought a proceeding under O56 of the *Supreme Court (General Civil Procedure) Rules 2005* seeking to have set aside as unlawful the decision made by the Knox City Council on 15 October 2013 to destroy her dog, Izzy.[1]

2 Izzy is a four year old Staffordshire Terrier. She was a family pet and one of three Staffordshire Terrier dogs - Izzy, Bub and Jock - previously owned by the plaintiff. In August 2012 and in May and June 2013, Izzy, Bub and Jock were involved (in various combinations) in attacks on other dogs, having on each occasion escaped from the plaintiff's backyard and wandered unattended into the surrounding streets. Jock was the youngest of the three dogs, and the only male. Jock was destroyed on 9 June 2013 immediately following two savage attacks on small dogs that also resulted in serious injuries to their owners. The Council seized Izzy and Bub, and Izzy has remained impounded ever since.

3 For the reasons that follow, none of the grounds for review is made out and the proceeding must be dismissed.

Background

Statutory framework

4 The legislation pursuant to which the Council's decision to destroy Izzy was made is the *Domestic Animals Act 1994* (Vic) (the 'Act').

5 Section 84P of the Act relevantly provides:

> The Council may destroy a dog which has been seized under this Part at any time after its seizure if –
>
> ...
>
> (e) the dog's owner has been found guilty of an offence under section 28, 28A or 29 with respect to the dog; or
>
> ...

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1 She also seeks a permanent injunction restraining the Council from exercising any powers in respect of Izzy by reason of the plaintiff's guilty plea entered on 12 September 2013 in the Magistrates' Court of Victoria.

Section 29(4) of the Act provides:

> If a dog that is not a dangerous dog or a restricted breed dog, attacks or bites any person or animal and causes death or a serious injury to the person or animal, the owner of the dog, if not liable for the offence under subsection (3), is guilty of an offence and liable to a penalty not exceeding 40 penalty units.

6 The expression 'serious injury' is defined in s 3 of the Act to mean 'an injury requiring medical or veterinary attention in the nature of … a laceration'. The word 'laceration' is relevantly defined in s 3 to mean 'a wound caused by … the tearing of body tissue … or … multiple punctures caused by more than one bite from a dog'.

The dog attacks

7 The decision to destroy Izzy was made following the successful prosecution of the plaintiff as the owner of Izzy, Bub and Jock for offences under the Act. The circumstances of the offences were as follows:

(a) On the morning of 4 August 2012, Jock and Izzy were seen to be running around unattended in the local park. They were subsequently involved in an attack on a four month old Border Collie cross at the nearby shopping centre. The plaintiff was not present at the time of the attack. Jock and Izzy were restrained and locked up temporarily behind a nearby bicycle shop. They were subsequently collected by the plaintiff or her partner, Mr Andrew Otto. The owner of the Border Collie, Ms Emily Edward, made a formal complaint about the incident to the Council but, although preliminary investigations were carried out by the Council ranger, those investigations were not concluded until after the further incidents almost a year later.

(b) On the morning of 29 May 2013, Jock and Bub were involved in an attack on another dog and its owner. Jock and Bub were seized and impounded by the Council, but subsequently released. Izzy was not involved in this incident.

(c) On the morning of 9 June 2013, all three dogs – Izzy, Jock and Bub – again escaped from the plaintiff's backyard and were involved in two vicious attacks on small dogs, in the course of which their owners were badly bitten

and required hospitalisation. Again, the plaintiff was not present at the time of these attacks. After the first attack, the dogs ran away. The second attack, which occurred shortly after the first near the entrance to the Boronia Veterinary Clinic, came to an end only following the intervention of veterinary clinic staff and patrons. Izzy and Bub ran off, but Jock had to be injected by the veterinarian with a drug to put him to sleep. The plaintiff organised for Jock to be destroyed that day.

The Magistrates' Court proceedings

8 On 20 June 2013, criminal proceedings were commenced against the plaintiff in the Magistrates' Court of Victoria in respect of the incidents on 29 May 2013 and 9 June 2013. The plaintiff was charged with 23 offences under the Act. On 24 June 2013, the Council commenced a further proceeding against the plaintiff in respect of the incident on 4 August 2012. The plaintiff was charged with a further six offences arising from that incident.

9 The plaintiff was represented in the Magistrates' Court proceedings by a solicitor, Mr Brett Melke. Prior to the hearing date, Mr Melke was involved in discussions about the charges with the Council's legal representatives. In the course of these discussions, Mr Melke obtained an assurance that the Council would not seek an order from the Magistrates' Court for the destruction of Izzy and Bub. The Council's Local Laws Co-ordinator, Ms Kirsten Hughes, instructed the Council's solicitor, Ms Kylie Walsh, that the Council would not seek destruction orders from the Magistrates' Court, but that it would be having 'a panel hearing in relation to the fate of Izzy' and that the plaintiff would be notified of this 'shortly after the Court case'.

10 By email dated 29 August 2013, Ms Walsh informed Mr Melke only that the Council would not be seeking an order from the court for the destruction of the dogs. There is a dispute about whether Ms Walsh subsequently told Mr Melke that the Council would nonetheless convene a panel hearing to determine the fate of Izzy.

11 As a result of communications between Mr Melke and Ms Walsh, the plaintiff pleaded guilty to 20 charges arising from the incidents on 4 August 2012, 29 May

2013 and 9 June 2013. In relation to the incident on 4 August 2012, the plaintiff pleaded guilty to a contravention of s 29(4) of the Act with respect to Izzy. This contravention was based on Izzy having bitten a person, causing a 'serious injury'. It was alleged that in the course of the attack on the Border Collie on 4 August 2012, Mrs Jennifer Edward was bitten on the finger by Izzy while attempting to pull Izzy off her daughter's dog. The bite caused a 1½ centimetre laceration on Mrs Edward's middle right finger, which subsequently required medical treatment in the form of a dressing and a course of antibiotics.

12 On 12 September 2013, the plaintiff was convicted in the Magistrates' Court of the 20 charges to which she pleaded guilty and given a community corrections order for a period of 12 months.

The panel hearing

13 On 13 September 2013, the day after the Magistrates' Court hearing, the Council wrote to the plaintiff to inform her that it intended to consider whether to exercise the power in s 84P of the Act to have Izzy destroyed and invited the plaintiff to a 'panel hearing' on 30 September 2013. The letter referred to the constitution of the panel and invited the plaintiff to attend the hearing and provide a written and/or oral submission to assist the Council to make a decision. The letter stated that the Council would consider the seriousness of the attack, the potential future risk to the community, as well as the court proceedings, any response from the victim and the plaintiff's submissions. The letter further advised that if a destruction order was not made, the Council would consider whether Izzy should be declared 'dangerous' under the Act.

14 Mr Melke prepared a written submission for the panel hearing on behalf of the plaintiff. It included information about the proposed future living arrangements for Izzy, referring to temporary accommodation with Mr Otto and the steps which had been taken to secure the plaintiff's residence to prevent dogs from escaping in the future. The submission argued that Izzy's transgression was relatively minor and that the bite was not a serious one despite being classified as a 'serious injury' for the

purposes of the Act. Mr Melke attached to his submission a generally favourable report on Izzy prepared by an animal behaviourist, Ms Kate Mornement.

15 The panel hearing was conducted in the Knox Civic Centre on 30 September 2013. The panel comprised the Council's delegate for the purposes of s 84P, Mr Angelo Kourambas, Ms Hughes and a Mr Dickson, who was the Manager of City Safety and Health. Each of the panel members held a delegation from the Council for the purposes of s 84P of the Act, but Mr Kourambas was identified as the delegate charged with making the decision with respect to Izzy.

16 The plaintiff, together with Mr Otto, a neighbour and some of her own and her neighbour's children, attended the panel hearing and made representations to the panel. The panel also heard from Emily Edward and Jennifer Edward as the victims of the attack on 4 August 2012. The plaintiff and her family and friends were asked to leave the room while the Edwards spoke, as they had told the panel that they would feel intimidated if the plaintiff and her supporters remained in the room. The substance of what was said by the Edwards was conveyed to the plaintiff, and she was given an opportunity to respond to it.

17 After the panel hearing and following a discussion with the other members of the panel, Mr Kourambas made the decision that Izzy should be destroyed. The plaintiff was notified of the decision and the reasons for it in a letter from Mr Kourambas dated 15 October 2013, which stands as the Council's reasons for decision (the 'Reasons').

18 The Reasons respond to a number of points made in the written submission prepared by Mr Melke. Mr Kourambas did not accept that the dog bite the subject of the offence on 4 August 2012 was 'minor', stating that the offence concerned a 'serious injury' as defined in the Act. Mr Kourambas referred to the two incidents on 9 June 2013 and said:

> Mr Melke comments that your dog was not involved in causing any injury to any dog in the attacks on 9 June 2013. Your dog may not have caused serious injury to a person or dog on 9 June 2013, however, your dog's

> involvement in the two incidents, as part of a 'pack' with two other dogs cannot be ignored.
>
> The subsequent attacks on 9 June 2013 indicated that your dog has ... continued to show aggression towards other dogs and that the attack on 4 August 2012 was not an isolated incident. Further, you, as an owner, had not taken appropriate steps between August 2012 and June 2013 to ensure that your dog was not aggressive towards other dogs or appropriately managed and controlled.

19 Mr Kourambas otherwise accepted and took into account that Izzy was not aggressive towards dogs known to her or towards humans in the absence of unknown dogs. However, in giving his decision, Mr Kourambas said:

> The Knox community should be allowed to walk their dogs in public freely, without fear of attack by dogs that are aggressive. Your dog attacked a person causing a serious injury in August 2012. Subsequently as a result of you not taking appropriate action to confine your dog or to address its aggression your dog was involved in two attacks on dogs and people in June 2013.
>
> The only appropriate order in these circumstances is that your dog be destroyed.

Grounds for review

20 The plaintiff originally advanced six grounds for review. She did not pursue the first ground, which was that the Council erred in failing to consider whether a dangerous dog declaration under s 34 of the Act would be an appropriate order.

21 The remaining grounds for review are as follows:

(a) The delegate's decision is affected by apprehended bias because Ms Hughes was one of the members of the panel and because of the nature of the evidence on which the delegate relied in his decision (the 'apprehended bias ground').

(b) The delegate's decision is affected by bad faith because the Council misled the plaintiff by stating that it would not seek an order from the Magistrates' Court to have Izzy destroyed, thus inducing the plaintiff to plead guilty to certain charges, whilst at the same time failing to disclose that it intended to have a panel hearing to consider whether Izzy should be destroyed (the 'bad faith

ground').

(c) The delegate's statement of reasons is inadequate because it does not show whether the Council considered whether a dangerous dog declaration ought to be made (the 'inadequate reasons ground').

(d) The plaintiff was denied procedural fairness at the panel hearing because:

(i) the panel heard from Emily and Jennifer Edward in the absence of the plaintiff;

(ii) the plaintiff was denied an opportunity to respond to the Council's stated belief that she had failed to take steps to restrain her dog; and

(iii) the plaintiff was not informed that, as a result of her not being permitted to keep Izzy at her home, the Council considered the making of a dangerous dog declaration to have been ruled out.

(the 'procedural fairness ground')

(e) The delegate's decision was manifestly unreasonable because:

(i) it was made on the basis of a finding for which there was no evidence, namely that Izzy bit Jennifer Edward; and

(ii) even if the evidence showed that a bite was inflicted by Izzy, the exercise of the Council's discretion was disproportionate and therefore unreasonable.

(the 'unreasonableness ground').

22 The plaintiff relied on her affidavits sworn on 19 November 2013, 4 February 2013 and 11 February 2013.

23 The Council relied upon the following affidavits:

(a) an affidavit of Ms Kirsten Hughes dated 19 December 2013;

(b) an affidavit of Mr Stephen Martonyi dated 20 December 2013;

(c) an affidavit of Ms Kylie Walsh dated 23 December 2013;

(d) a further affidavit of Ms Hughes dated 14 February 2014; and

(e) a further affidavit of Ms Hughes dated 3 March 2014.

24 Each of the deponents was cross-examined. The defendant also subpoenaed Mr Brett Melke, who gave evidence and was cross-examined.

The 'no evidence' contention

25 A number of grounds are based, at least in part, on the proposition that there was in fact no evidence that Izzy bit Jennifer Edward. The plaintiff contends that the Council officers knew this to be so, but proceeded to charge the plaintiff with an offence, negotiated a plea with her and then had her convicted of the offence based on Izzy having bitten Jennifer Edward in order to enliven s 84P of the Act and permit the destruction of Izzy.

26 As the contention that there was no evidence that Izzy bit Jennifer Edward and the Council knew this to be so straddles a number of grounds, it is convenient to deal with it at the outset.

27 In substance, the plaintiff submits that the alleged bite victim, Jennifer Edward, was unable to state which dog bit her during the incident on 4 August 2012, and that there was no evidence at all that Izzy bit her or any other person. According to the plaintiff, the Council, well knowing this to be the case, proceeded with the charge directed at Izzy based on the injury to Jennifer Edward ('charge 4'), failed to disclose to the plaintiff that Jennifer Edward was unable to state which dog bit her, took advantage of the fact that the plaintiff was not present during the incident and therefore not in a position to contradict the evidence of Jennifer Edward, entered into a plea bargain with the plaintiff on the basis that the plaintiff would plead guilty to charge 4 when that charge ought not to have been laid or pursued, and relied on the plaintiff's plea of guilty to charge 4 to enliven its power under s 84P to convene a

panel hearing to determine the fate of Izzy. Moreover, at the panel hearing, the Council did not inform the plaintiff that Jennifer Edward was unable to state which dog bit her and then made a decision to destroy Izzy in circumstances where there was no evidence that she bit anyone.

28 The evidence concerning the events on 4 August 2012 was initially obtained from the owner of the Border Collie and Jennifer Edward's daughter, Emily Edward. On 20 August 2012, Emily Edward made a statement to the Council ranger who was investigating the attack, Mr Stephen Martonyi. Emily Edward recorded walking with her mother, son and four month old Border Collie to the bakery on Mountain Highway on the morning of Saturday, 4 August 2012. She described seeing two dogs fitting the description of Jock and Izzy roaming around in the park and then returning to the area near the butcher shop. She stated that the dogs lunged towards her dog and latched on to its neck and ear. She screamed at the dogs and tried to pull them off her dog. A lady and the butcher jumped on the two dogs and pulled them off her dog. Her dog was covered in blood and had to be taken to the Boronia veterinary clinic for treatment. The role that Jennifer Edward played in this incident was to run home to get the car so that the Border Collie could be taken to the vet for treatment.

29 Emily Edward's statement was provided to the plaintiff and Mr Melke prior to the Magistrates' Court hearing. On 10 July 2013, Mr Melke wrote to the Council stating that there was 'no evidence whatsoever that Izzy attacked the woman, let alone caused her injury'. In other words, he pointed out that Emily Edward's statement did not implicate Izzy in any biting. As a result, Ms Hughes spoke directly to Emily Edward by telephone and then directed Mr Martonyi to obtain an additional statement to clarify whether Emily Edward or Jennifer Edward could say 'what dog did what' during the attack.

30 On 13 August 2013, Emily Edward made a further statement to Mr Martonyi and Jennifer Edward also made a statement.

31 In Emily Edward's further statement, she referred to scabbing on the left ear and under the left eye of a Jack Russell terrier. This was the first mention of an attack on a Jack Russell terrier and came, as it were, 'out of the blue'. Emily Edward said that the Jack Russell terrier was also involved in the attack, but only received superficial injuries. She stated that the dog that injured the Jack Russell terrier was a small female brown/brindle Staffordshire bull terrier. The other dog was firmly locked onto the neck of the Border Collie, so it was apparent that it was the smaller brown/brindle dog that did the damage to the Jack Russell.

32 The small female brown/brindle dog must have been Izzy.

33 For her part, Jennifer Edward stated that she and Emily were in different shops when she saw the two Staffordshire terrier dogs run past the laneway near the bike shop and restaurant. She had a feeling that they were running toward Emily, so she went to have a look. She heard screaming and saw the dogs attacking Emily and her Border Collie. She stated:

> I tried to pull the small female light brown brindle dog off Emily's dog and in the process, I was bitten on my left forefinger. The wound was a single puncture and a rip. I received antibiotics and had the wound cleaned at Access Medical in Wantirna South.

34 The plaintiff submits that this does not amount to evidence that Izzy bit Jennifer Edward. Jennifer Edward merely says she 'was bitten' while trying to pull the small female light brown/brindle dog off Emily's dog, but does not say that it was the small female light brown/brindle dog that bit her.

35 Mr Martonyi was cross-examined about obtaining the further statement from Emily Edward and the statement from Jennifer Edward and about the content of these statements. He told the Court that the reason for obtaining evidence from Jennifer Edward was to ascertain whether she had been bitten at all. He agreed that Jennifer Edward simply said that in the process [of pulling the female light brown/brindle dog off the Collie] she was bitten on her left forefinger. Mr Martonyi was asked to look at Jennifer Edward's statement and to confirm that she did not state by which

dog she was bitten. He said: 'No, she does not mention which dog'. In the next question, Mr Martonyi was asked to confirm that she [Jennifer Edward] was not able to say which dog bit her, and he said: 'No, Your Honour'.[2]

36 On the basis of this limited exchange, the plaintiff submits that Mr Martonyi knew that Jennifer Edward was not able to say which dog bit her at the time he took her statement. The plaintiff submits that this fact, when read together with the statement of Jennifer Edward, supports a conclusion that there was never any evidence that Izzy was the dog that bit Jennifer Edward.

37 In my view, Mr Martonyi's answers do no more than confirm that, in her statement, Jennifer Edward does not clearly state which dog bit her because she uses the passive voice. Mr Martonyi's answers show that he can read. I do not understand Mr Martonyi's answers to be that when he interviewed Jennifer Edward, she could not tell him which dog bit her.

38 I do not accept that there was no evidence that Izzy was the dog that bit Jennifer Edward. Although it is unhelpful that the relevant sentence in Jennifer Edward's statement is phrased in the passive voice, I consider the meaning of what Jennifer Edward was stating to be tolerably clear, which is that the small female light brown/brindle dog [Izzy] bit her while she was trying to pull the small female light brown/brindle dog [Izzy] off Emily's dog [the Border Collie puppy]. Furthermore, from Emily Edward's evidence that the other dog – Jock – was firmly locked onto the neck of the Border Collie at the relevant time, it is reasonably open to infer that Izzy bit Jennifer Edward, as Izzy was the other dog involved in the attack.

39 Ms Hughes' evidence was that when she spoke to Emily Edward to clarify whether she or her mother knew which dog 'did the attack', Emily Edward was quite clear, having spoken to her mother, that while the male dog had a hold of the Border Collie puppy it was the other dog that bit her mother.

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2 Transcript of Proceedings, *Tania Isbester v Knox City Council* (Supreme Court of Victoria, S CI 2013 6020, Emerton J, 27 February 2014) 376.

40 There is no question that Jennifer Edward was bitten by a dog during the attack on 4 August 2012. Knox City Council records show a complaint to have been received from Emily Edward on 6 August 2012 advising that 'people' had been bitten whilst separating the dogs. Notes from a medical practitioner made on 4 August 2012 record the existence of the wound and the fact that it occurred 'when the victim tried to save the puppy and was bitten on her right middle finger'.

41 The plaintiff, having read the statements of Emily Edward and Jennifer Edward and taken the advice of Mr Melke, was prepared to enter a plea to charge 4 on the basis that there was evidence that Izzy bit Jennifer Edward. On 29 August 2013, Mr Melke advised the plaintiff as follows:

> (2) Council agrees to our insistence that you plead guilty to one charge of 'a dog' (not specifically Izzy or Bubba) causing non-serious injury to Morales' dog and one charge of 'a dog' causing non-serious injury to Delfine's dog; this is instead of a charge of causing serious injury for both dogs in both the Morales and Delfine incidents;
>
> (3) Council will not however downgrade the charge of Izzy causing serious injury by biting the owner of the border collie in the first incident. You will need to plead guilty to this because the evidence is clear that Izzy bit the owner. Unfortunately, this means Izzy could be declared dangerous because she has caused serious injury. Bubba cannot be declared dangerous nor menacing on account of the criminal charges because there is now no charge that Bubba has caused any injury to anyone or anything.

42 Furthermore, the Summary of Offence prepared for the Magistrates' Court plea, agreed to by the plaintiff on the advice of Mr Melke, stated that 'Ms Jennifer Edwards (sic) tried to save the puppy and was bitten on the finger by the dog known as "Izzy"'. Mr Melke subsequently prepared submissions for the panel hearing that were based on Izzy having bitten Jennifer Edward. The submissions focused on the trifling nature of the injury, pointing out that the wound did not even require stitches or follow-up medical attention. It was submitted that the fact that Izzy had caused the injury did not show that she was human aggressive or a danger to humans and that there was no evidence that Izzy had caused any injury to another dog.

43 In any event, insofar as the delegate relied on Izzy having bitten Jennifer Edward to make his decision, this court cannot review the merits of that finding. Whether an administrative decision-maker had sufficient or adequate evidence to make a particular finding of fact is not reviewable. To have the decision set aside on the ground of an incorrect factual finding, it would be necessary to establish that there was no evidence at all capable of supporting the factual finding.[3] There is no jurisdictional error in the decision-maker simply making a wrong finding of fact.[4]

44 For the reasons given, I am not persuaded that there was no evidence at all capable of supporting a finding that Izzy bit Jennifer Edward. To the contrary, I am satisfied that there was evidence to support such a finding.

45 Furthermore, the attempt to reopen whether Izzy bit Jennifer Edward in circumstances where the Magistrates' Court convicted the plaintiff of owning a dog - Izzy - that bit a person - Jennifer Edward - constitutes a collateral attack on the conviction and ought not to be entertained by this court.

The bad faith ground

46 The plaintiff relies on two matters to support the bad faith ground. She says:

(a) the Council made misleading representations to the plaintiff and her solicitor in response to the specific question asked by Mr Melke as to the Council's intentions regarding the fate of Izzy and Bub and failed to make a frank disclosure of its intention regarding Izzy in response to that direct question; and

(b) the Council well knew that the alleged victim, Jennifer Edward, was unable to state which dog bit her during the incident of 4 August 2012.

47 I have already rejected the second contention. It is unnecessary to deal with it further in the context of the bad faith ground.

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3 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356.

4 *Abebe v Commonwealth* (1999) 197 CLR 510, 560 at [137].

48 The first matter relied upon is based on the allegation that the Council did not disclose until after the conclusion of the Magistrates' Court hearing on 12 September 2013 that it intended to have a panel hearing to decide the fate of Izzy. The plaintiff says that had she known that a plea of guilty would lead to the Council convening a panel hearing to determine whether it would kill her dog, she would not have entered a plea of guilty to charge 4. She contends that she would have been on a good footing to contest that charge, given the evidence of Emily and Jennifer Edward was confused, uncertain and contradictory.

49 There is a dispute about whether Ms Walsh told Mr Melke that the Council intended to have a panel hearing in relation to the fate of Izzy at any time before the Magistrates' Court hearing.

50 On 28 August 2013, Mr Melke emailed Ms Walsh requesting a reply to an offer made by the plaintiff to plead to certain charges. He asked Ms Walsh, 'What does Council intend about the fate of the two remaining dogs, given the dog Jock has already been voluntarily euthanased (sic)'. Ms Walsh contacted Ms Hughes to obtain instructions. Ms Hughes emailed Ms Walsh on 29 August 2013, relevantly, as follows:

> We won't be seeking orders from the court in relation to the dogs. With the collection of charges, there will not be any charges for which a destruction order could be placed on Bub (correct me if I am wrong). She could be released on the day the matter is settled, provided she is registered etc. However the housing commission have indicated the dog cannot be housed at 10 Suzanne Court, so she will need to be registered somewhere else. Council would be having a panel hearing in relation to the fate of Izzy and Isbester would be notified of this shortly after the Court case.
>
> Call me if that doesn't make sense!

51 Ms Walsh subsequently sent an email to Mr Melke to confirm that the Council would not be seeking an order from the court in relation to the destruction of the dogs. She did not say anything in that email about the panel hearing that Ms Hughes had foreshadowed. The plaintiff contends that Ms Walsh's email to Mr Melke was therefore 'evasive, misleading and incomplete'.

52 However, Ms Walsh gave evidence that she did tell Mr Melke about the panel

hearing some time before the Magistrates' Court hearing. Ms Walsh was frank about not being able to remember when this occurred: she nominated five occasions on which it might have occurred, including immediately before court on the morning of the hearing. However, she was adamant that she did tell Mr Melke about the proposed panel hearing. For his part, Mr Melke gave evidence that he could not recall being told that there would be a panel hearing, although he did not exclude the possibility. He said:

> Look, all I can think of is that possibly – because I know Ms Walsh would not be lying, simply it would have been that maybe I was distracted by someone – by something else that was going on or Ms Isbester talking very quickly as she often did and I missed what was being said to me, that's all I can think of.

53 Both Mr Melke and Ms Walsh struck me as honest and reliable witnesses. Ms Walsh was sure that she told Mr Melke about the proposed panel hearing; Mr Melke conceded that she may have done so.

54 The plaintiff submitted that had Ms Walsh told Mr Melke about the proposed panel hearing, that information would have found its way into his correspondence at some point. She further submitted that if Mr Melke was told about the panel hearing, it must have been after the Magistrates' Court hearing, probably when the plaintiff was informed that she would not be able to take Izzy home.

55 Given the evidence of Ms Walsh and Mr Melke, I find, on the balance of probabilities, that Ms Walsh told Mr Melke about the panel hearing at some point before the Magistrates' Court hearing. It is likely that this information did not properly register with him at the time, which would explain why it wasn't communicated by him to the plaintiff and didn't appear in his correspondence.

56 Whatever Mr Melke was told or not told by Ms Walsh, however, Mr Melke well knew that there was a possibility that the Council would exercise its power under s 84P of the Act if it did not seek an order from the Magistrates' Court for the destruction of Izzy. Furthermore, Mr Melke advised the plaintiff of this possibility on more than one occasion. On 29 August 2013, Mr Melke wrote to the plaintiff and

Mr Otto enclosing emails from the Council's solicitors and explaining them as follows:

> Council will not seek to destroy the dogs by application to court – technically this means that they can still elect to destroy the dogs without application to court, though it is unusual for that to happen once it is agreed no application for destruction will be made to court – however, we will clarify that with council;

57 Mr Melke's evidence was that he did not clarify the matter with the Council.

58 On 2 September 2013, Mr Melke had a telephone conversation with the plaintiff. His notes of this attendance were in evidence (the 'file note'). The file note records Mr Melke telling the plaintiff that the Council 'could still destroy dog but unlikely. Can even if court does not destroy'.

59 It is clear, therefore, that Mr Melke advised the plaintiff before she pleaded to charge 4 that the Council could still make its own decision to destroy Izzy even if it did not seek a destruction order from the court.

60 On 3 September 2013, Mr Melke again wrote to the plaintiff and Mr Otto confirming that the case had been settled as instructed and stating that the settlement was 'extremely good'. The implications of the settlement were described as follows:

> The dogs are not to be destroyed by application to court. Neither Izzy nor Bub are found to have committed any attack on any dog though it will be found that some unknown dog belonging to you attacked and caused serious injury to the poodle and the pug. This is extremely good given the number of charges originally involving them attacking dogs.
>
> Izzy is found to have attacked a person and caused serious injury, though it is an attack in the context of the victim intervening in a fight between two dogs and not a direct attack on a human.

61 The plaintiff's evidence was initially that she was not told by Mr Melke that the Council could consider destroying Izzy in the future. She said Mr Melke never advised her that the Council could go ahead and destroy Izzy. Her recollection was that they discussed that the Council could technically make Izzy a 'dangerous dog'.

62 The plaintiff was cross-examined about the discussion recorded in the file note. In

response to the notation that Council could still destroy the dog 'but unlikely', the plaintiff conceded that that might have been 'one brief thing' Mr Melke said to her, but he also said that destruction was very unlikely and the focus was on a dangerous dog declaration. She confirmed that Mr Melke thought that it would be very unlikely for 'it' to go on after court - such a course was unheard of in his opinion. She said that the fact that the Council could destroy the dog was not the 'main message' given to her.

63 It is apparent that the plaintiff misinterpreted Mr Melke's advice or failed to focus on its detail. In the light of Mr Melke's advice that the Council was unlikely to make a decision to destroy Izzy, the plaintiff put this possibility out of her mind. She confirmed her belief that, on the basis of the advice that she received from Mr Melke, the worst possible outcome for Izzy was a dangerous dog declaration.

64 Mr Melke gave evidence that it was sometimes a bit difficult to get instructions from the plaintiff and that 'she tended to tell a lot and not listen an enormous amount at times'. However, he agreed that, in terms of possible outcomes for Izzy, his advice to the plaintiff had focused on the prospect of a dangerous dog declaration and not a destruction decision, and agreed that this focus might have caused some confusion for the plaintiff.

65 In light of this evidence, I accept the Council's submission that if the plaintiff was under any misapprehension about what the Council might do, it was caused by her understanding of the advice given to her by Mr Melke. It was not a product of any false or misleading representation made by the Council or any of its officers.

66 Much was made during the trial of the proceeding of the email from Ms Hughes to Ms Walsh on 29 August 2013 in which Ms Hughes gave the instruction that the Council would not seek orders from the court in relation to the dogs. This email was said by the plaintiff to reveal some kind of subterfuge on the Council's part, in order to keep from the plaintiff the fact that the Council would be holding a panel hearing in relation to Izzy. That the plaintiff 'would be notified of this shortly after the Court

case' was said to reveal a ploy to induce the plaintiff to plead guilty to charge 4 before the Council moved to convene a panel hearing and make a destruction order.

67 Again, I consider that this involves a misreading of the evidence. The fact that the plaintiff would be notified of the panel hearing shortly after the court case means no more than that the Council would only move to convene a panel hearing for the purposes of s 84P of the Act when it was in a position to exercise its powers under that section, namely, after the conviction of the plaintiff for the offence under s 29(4) of the Act. Such an interpretation is consistent with the fact that the Council had no power to consider making a decision under s 84P(e) until the Magistrates' Court proceeding was concluded and a conviction had been secured. The Act itself requires a staged process, commencing with a successful prosecution.

68 The plaintiff sought to identify malign intent in other parts of the email. For example, the words in parentheses, 'correct me if I'm wrong', in relation to Bub were said to reveal a desire to obtain a destruction order for Bub if at all possible. However, such a desire would be entirely inconsistent with the plea bargain that had been struck on Ms Hughes' instructions. There was no evidence that Ms Hughes had any predisposition towards the destruction of Bub. Indeed, the evidence was entirely to the contrary. Bub's involvement in the attacks on 9 June 2013 had no adverse consequences for her at all despite clear statements from witnesses that all three dogs were involved in the attacks.

69 I observe that that the email in question did *not* instruct Ms Walsh to keep from the plaintiff the fact that the Council would convene a panel hearing in relation to Izzy. In response to Mr Melke's query about what the Council intended be the fate of the dogs, Ms Hughes instructed Ms Walsh that there would be a panel hearing in relation to Izzy and Ms Isbester would be notified of this shortly after the court case. If Ms Walsh did not tell Mr Melke about the proposed panel hearing, it was because she neglected to do so, not because Ms Hughes gave instructions to that effect.

70 Nonetheless, the plaintiff persisted in portraying Ms Hughes as the villain of the

piece. She submitted that Ms Hughes was 'on a course seeking to have the dog destroyed', that there seemed to be 'a determination on [Ms Hughes'] part to get a conviction that would enliven the [Council's] jurisdiction' and that the fact that the intention to hold a panel hearing wasn't disclosed demonstrated that 'Ms Hughes had in her mind a determination to seek to ensure this panel brought about a result whereby the dog was destroyed'. This was said to 'tie in' with Ms Hughes shutting out of her mind a dangerous dog declaration.

71 I reject these submissions. They are not consistent with the fact and content of the plea bargain. Nor are they consistent with the fact that in giving Ms Walsh instructions to respond to Mr Melke's query, Ms Hughes gave instructions that there would be a panel hearing to determine the fate of Izzy.

72 Attacks were made on Ms Hughes' credibility on the basis of answers that she gave in cross-examination about communications with the Department of Human Services (referred to as the 'housing commission') about whether, in the light of the attacks, the dogs could continue to reside at the plaintiff's home, and communications between her and Jennifer Edward about 'which dog did what'. Ms Hughes' evidence about what the plaintiff said about the consequences of a dangerous dog declaration – that Izzy would have to be destroyed – was also impugned.

73 However, I found Ms Hughes to be an honest and reliable witness who did her best to answer what were sometimes convoluted questions put to her in cross-examination. Indeed, I found all of the witnesses in this case to be credible and generally reliable, including the plaintiff (who, along with her children, conducted herself with dignity throughout the hearing). I have not found it necessary to prefer the evidence of one witness over that of another because, apart from whether Ms Walsh told Mr Melke about the proposed panel hearing and whether Ms Hughes harboured a desire to have Izzy destroyed, very few facts were in dispute.

74 As to Ms Hughes' alleged motive or motives, particularly when she sent the 29

August email to Ms Walsh, I reject the submissions made by the plaintiff. Based on what the learned magistrate had to say about the offences, it is clear that he would have made a destruction order if asked by the Council to do so. The magistrate was plainly outraged by what he was told about the dog attacks. He was very keen to make a destruction order. Had Ms Hughes wanted to ensure that Izzy destroyed, she could simply have left it to the Magistrates' Court to make the order.

75 Furthermore, I consider it to be unexceptional and unsurprising that Ms Hughes contacted the housing commission about the dogs' future living arrangements and Jennifer Edward (through her daughter, Emily) to try to establish which dog bit her. The conversation with the housing commission turned out to be both relevant and helpful in respect of at least Bub, who needed to be re-housed upon release following the Magistrates' Court proceedings. And in the light of Mr Melke's observation about the state of the evidence concerning the events on 4 August 2012, it is unsurprising and perfectly proper that Ms Hughes directed Mr Martonyi to obtain further statements from Emily and Jennifer Edward.

76 There is nothing to suggest that Ms Hughes is a zealous destroyer of dogs. Her evidence was that of the seven panel hearings convened during her time as Local Laws Coordinator, only two had resulted in the making of destruction orders.[5]

77 Although I understand the plaintiff's desperation to save her dog, allegations of bad faith should not be lightly made. There must be good grounds for doing so. As Heerey J said in *VDAE v Minister for Immigration & Multicultural & Indigenous Affairs*[6]:

> An allegation of lack of good faith is a serious one. The circumstances in which the Court will find an administrative decision maker had not acted in good faith are rare and extreme: see *SBBS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 361 at [44]. The allegation implies a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker: see *NAAV at [107]*. An allegation of bad faith, like an allegation of fraud, should not be advanced by an advocate unless there are proper grounds for doing so: see *SCAS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002]

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5 Transcript of Proceedings, *Tania Isbester v Knox City Council* (Supreme Court of Victoria, S CI 2013 6020, Emerton J, 24 February 2014) 228-9.

6 [2002] FCA 1557.

FCAFC 397 at [19].[7]

78 The plaintiff sought to articulate her allegation of bad faith by reference to the High Court's discussion of bad faith in an administrative law context in *SZFDE v Minister for Immigration and Citizenship*,[8] submitting that it was not the 'red blooded' form of fraud recognised by the common law. She submitted that there was no requirement for express dishonesty and that the failure was a failure to observe standards that equity would have required of persons exercising fiduciary powers.

79 However, the allegations made against Ms Hughes were in the nature of dishonesty, that is, 'tricking' the plaintiff into pleading to charges by deliberately concealing information. They were serious allegations indeed, and they were not substantiated.

80 The bad faith ground is not made out.

The panel hearing and the natural justice grounds

81 The apprehended bias ground and the procedural fairness ground both arise out of the conduct of the panel hearing and they invoke respectively the two fundamental rules of natural justice, commonly described as the hearing rule and the bias rule. It is convenient to deal with the natural justice grounds together.

82 In *Gubbins v Wyndham City Council*,[9] the Supreme Court held that the common law requirement to accord procedural fairness had not been excluded under the equivalent provisions of the Act's predecessor legislation.[10] The Council does not dispute that it is required to accord procedural fairness to the owner of a dog before exercising the power in s 84P of the Act.

83 However, it is necessary to determine the content of the requirement having regard

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7 Ibid, [18]. Likewise, in *SCAS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 397, the Full Federal Court said: '[B]ecause of the nature of the allegation of bad faith, serious questions of professional ethics arise. It should be clearly understood that an allegation of bad faith, like an allegation of fraud, should not be advanced by an advocate unless there are proper grounds for doing so'.

8 (2007) 232 CLR 189.

9 (2004) 9 VR 620.

10 *Domestic (Feral and Nuisance) Animals Act 1994* (Vic).

to the statutory framework. In *NCSC v News Corp Ltd*[11] Brennan J stated that:

> The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are material factors in determining what must be done to satisfy the requirements of natural justice.[12]

84 In *Ebner v Official Trustee in Bankruptcy*,[13] the High Court articulated the test for apprehended bias by reference to the apprehension of a fair minded lay observer. Apprehended bias will be established where the fair minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question he or she is required to decide.

85 However, in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[14] the High Court held that the application of the *Ebner* principles will not be the same when a decision is not vested in a judicial officer. The content of administrative law requirements in relation to bias by pre-judgment depends upon the circumstances and that there can be no automatic application of rules developed in the context of judicial decision-making to administrative decisions. Justice Hayne observed that the analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm.[15] His Honour compared decisions taken within the judicial model with other administrative decisions and said:

> It is critical, then, to understand that assessing how rules about bias, or apprehension of bias, are engaged depends upon identification of the task which is committed to the decision-maker. The application of the rules requires consideration of how the decision-maker may properly go about his or her task and what kind or degree of neutrality (if any) is to be expected of the decision-maker.[16]

86 To similar effect, in *Hot Holdings Pty Ltd v Creasy*,[17] McHugh J said:

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11 (1984) 156 CLR 296.
12 Ibid 326.
13 (2000) 205 CLR 337, 344 ('*Ebner*').
14 (2001) 205 CLR 507.
15 Ibid 563.
16 Ibid 565.
17 (2002) 210 CLR 438.

> While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision.[18]

87 The question of apprehended bias, be it in the form of pre-judgment, prior association or otherwise, must therefore be considered by reference to the statutory arrangements for the exercise of the power in s 84P of the Act.

88 In respect of the requirements of procedural fairness generally, it has been said that:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.[19]

89 In *Mobil Oil Australia Pty Ltd v FCT*,[20] Kitto J referred to 'the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place.'[21]

90 It is necessary, therefore, to consider how a delegate may properly go about his or her task of deciding whether to order the destruction of a dog pursuant to s 84P of the Act and what neutrality is to be expected of the delegate in the performance of this task.

91 Section 84P is in Part 7A of the Act, which confers extensive powers on councils (or officers authorised by the council) to seize and dispose of dogs and cats. Division 6, in which s 84P appears, is particularly concerned with disposal. Section 84O confers powers to sell or destroy dogs and cats that have been seized; section 84P confers what is described as a 'further power' to destroy dogs that have been seized. Sections 84TA and 84TB permit the Council to destroy a dog seized under Part 7A based, in large part, on the belief of an authorised officer that the dog is a danger to the public or that the dog may cause serious injury or death to a person or other animal.

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18 Ibid 460.
19 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.
20 (1963) 113 CLR 475.
21 Ibid 504.

92 Division 6 of the Act is therefore directed to ensuring that dogs that represent a danger to the community (including to other animals) are dealt with by removing them from the community, that is, by destroying them. It is recognised that this may have to take place quickly and without notice to the owners in certain circumstances. Division 6 is essentially protective of the public.

93 In this context, s 84P provides that the Council may destroy a dog which has been seized under Part 7A at any time after its seizure in a range of circumstances, including where the dog's owner has been found guilty of an offence under s 28, 28A or 29 of the Act with respect to the dog.[22]

94 Section 84P is directed principally to managing dogs that are 'dangerous dogs' or 'restricted breed dogs', particularly where the owner has been found guilty of an offence under the Act. However, s 84P(e) provides for a council to exercise the power to destroy a dog that is not a 'dangerous dog' or a 'restricted breed dog' where there is a conviction arising from the dog having been set on or urged to attack, bite, rush or chase a person or an animal, having been trained to attack, bite, rush at, chase or in any way menace persons or animals and, relevantly, having been involved in attacking or biting a person or animal, whether or not the attack or bite caused a 'serious injury'.

95 It is clear, therefore, that the legislature has conferred upon the Council a broad-ranging power to destroy a dog that has been involved in an attack on a person or animal, and the owner of the dog or the person in control of the dog has been convicted of an offence based on this event.

96 It is significant for the purposes of determining the content of the natural justice requirements for the exercise of the power under s 84P(e) that its exercise depends upon there first having been a finding of guilt in a curial proceeding. As Hanson J said in *Gubbins v Wyndham City Council*,[23] it is instructive to consider the process that

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22 Or a person other than the dog's owner has been found guilty of an offence under s 29 with respect to the dog.

23 (2004) 9 VR 620. His Honour's decision related to the equivalent provision to s 84P in predecessor legislation.

must be gone through before a court makes a finding of guilt:

> The proceeding in the Magistrates' Court will result from the seizure of the dog in question and will involve a hearing as to the circumstances of the alleged offence. The owner of the dog, as defendant in the court proceeding, will have an opportunity to be heard, to examine witnesses, and to say to the magistrate, or judge on appeal, what he might wish to say as to the alleged defence and on the matter of penalty. If then the defendant is found guilty then ipso facto, the council's power to destroy the dog is activated. In other words, the condition upon satisfaction of which the power will become available to the council is a determination of guilt in a judicial proceeding. Further, from such a finding in the Magistrates' Court a defendant has the right of appeal to, and a rehearing in, the County Court, and a right of appeal to the Supreme Court on a question of law. It is not to the point that there was no appeal in this case. The point is that what I have described is the legislative scheme.[24]

97 Because of the requirement in s 84P(e) for a conviction prior to any decision being made to destroy a dog,[25] the owner of the dog will have had the opportunity to be heard, to examine witnesses and say to the magistrate, or judge on appeal, what he or she might wish to say as to the defence and on the matter of penalty.

98 The content of the rules of procedural fairness in this case must be determined in this context.

Apprehended bias

99 The apprehended bias ground is based on the following:

(a) the involvement of Ms Hughes at various stages of the Council's prosecution of the plaintiff and in the panel hearing; and

(b) what is said to be the 'stubborn reliance' by the panel (as the alleged decision maker) upon evidence that did not prove the matters that it was relied upon to prove.

100 The second of these matters refers again to the evidence of the Edwards. I have already dealt with the substance of this point in rejecting the contention that there was no evidence that Izzy bit Jennifer Edward.

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24 Ibid 633.

25 That is not a restricted breed dog or a 'dangerous dog'.

101 As to the involvement of Ms Hughes, the plaintiff alleges that the decision to destroy Izzy was made by the panel, not by the delegate alone, and that Ms Hughes was integrally involved in the decision-making process of the panel.[26] Based on Ms Hughes' involvement in making the decision to destroy Izzy as described, the plaintiff contends that a fair minded lay observer might reasonably apprehend that the panel might not bring an impartial mind to the resolution of the question it was required to decide, in accordance with the principle in *Ebner*.[27] The plaintiff submits that Ms Hughes was disqualified from making the decision to destroy Izzy under s 84P of the Act on all of the bases identified by Deane J in *Webb v R*,[28] namely, as a result of interest, conduct, association and by reason of having extraneous information.

102 There are two elements to this argument: first, that the decision was effectively made by the panel, not the delegate; and secondly, that the presence of Ms Hughes on the panel gave rise to an apprehension of bias.

103 It is common ground that Ms Hughes was a 'delegated officer' for the purposes of s 84P, sat on the panel, attended the whole panel hearing, participated in discussions afterwards and drafted the Reasons. Ms Hughes was a member of the three person panel established to conduct a hearing and make a recommendation to the Council's delegated decision-maker, Mr Kourambas. The Court was told, and I accept, that the main reason why Ms Hughes was a member of the panel was because of her previous experience in animal management and her knowledge of the legislation relating to this issue. Ms Hughes' views would therefore carry considerable weight.

104 However, at law, the decision under s 84P of the Act was made by Mr Kourambas as the relevant delegate and not by the panel. The fact that Ms Hughes and Mr Dickson

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26 The plaintiff submits that the Council's attempt to depict Mr Kourambas as the person who made the decision represents an attempt to place Ms Hughes at arm's length from the decision. She points out that no distinction was drawn between Ms Hughes and the other members of the panel until after the decision to destroy Izzy was made and notified to the plaintiff on 15 October 2013. Indeed, the letter notifying the plaintiff of the panel hearing states that the panel would be constituted of three Council officers 'who will consider all the information before making any decision.'

27 *Ebner*, 344.

28 (1994) 181 CLR 41, 67–68.

also held delegations for the purposes of s 84P of the Act does not mean that they acted as delegates in this instance. The Council is entitled to appoint a number of officers to act as delegates to exercise particular powers, but in each instance to have only one delegate exercise the power in question. It is not the case that all of the available delegates exercise the power - either in fact or in law - when the power is purported to be exercised by only one delegate.

105 I therefore reject the submission that the destruction decision was made by the panel, not by the delegate.

106 In support of the submission that the mere presence of Ms Hughes on the panel gave rise to an apprehension of bias, the plaintiff alleges that Ms Hughes held 'a strong professional interest' in the outcome of the panel hearing, evidenced by her involvement in the Magistrates' Court proceedings (including making the decision to lay charges, authorising the charges, and acting as informant in relation to some of the charges), the inquiries that she made of the housing commission concerning the future accommodation of the dogs, her direction to Mr Martonyi to obtain sufficient proof to sustain the charges that were laid in respect of the 4 August 2012 incident, and the instructions she gave to Ms Walsh as to the plea bargain (which allegedly involved concealing the Council's intentions in respect of a future panel hearing). In addition, the plaintiff points to Ms Hughes' evidence that she drafted the letter of invitation to the panel hearing and the notice of seizure of Izzy,[29] and wrote or assisted in writing the Reasons.

107 This, according to the plaintiff, shows that Ms Hughes effectively directed the investigation and was the informant, the prosecutor and, as a member of the panel, a judge in the matter.

108 In my view, having regard to the legislative scheme, natural justice does not require a panel hearing before making a decision under s 84P(e), let alone a hearing by a panel comprising members who have had no involvement in the prosecution that

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29 Dated 17 September 2013.

enlivened the power. The Council must decide what to do with a dog that has attacked a person or animal in circumstances where the dog's owner has already been convicted of a relevant offence under the Act. There has been a curial process to establish that the attack took place and what its consequences were. The question for the council following the successful prosecution is, in substance, whether the dog can live safely in the community and, if so, how.

109 In these circumstances, there is no need for a form of quasi-judicial hearing to consider the future of the dog. In my view, it would be sufficient for any of the officers delegated by the Council to make the decision in question, having given the owner of the dog an opportunity to make submissions in writing as to what should now happen to the dog and an opportunity to respond to any adverse material. It cannot be the purpose of the panel hearing to re-open the factual findings made by the Magistrates' Court. Panel members, including the delegate, need not come to the panel hearing with a 'clean slate' regarding these matters.

110 Accordingly, a requirement for impartiality exists to the extent necessary to give the persons affected by the decision under s 84P(e) – the owner of the dog and possibly any victim of an attack – a genuine hearing as to whether the dog is capable of living safely in the community. In *McGovern v Ku-Ring-Gai Council,*[30] Basten JA identified the different decision-making expectations in a setting involving a local council compared to a court setting:

> The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councillor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers.[31]

111 The requirement that there be an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the dog owner's

30 (2008) 72 NSWLR 504.
31 Ibid 519.

submissions can be satisfied even where the delegate has been involved in the earlier prosecution. In my view, a fair minded observer would not apprehend that there might be a disqualifying predisposition from the fact that the decision-maker under s 84P(e) was also involved in the prosecution of the owner for offences under s 29(4) of the Act.

112 The decision of the High Court in *Stollery v Greyhound Racing Control Board*[32] relied upon by the plaintiff is distinguishable. There, the High Court held that the presence of a person during deliberations by the Greyhound Racing Control Board in a disciplinary matter concerning an attempt to bribe that person could cause a reasonable man to 'very properly' suspect that the opportunity to influence the decision of the Board might have been used. However, the person in question was in the position of an accuser before the Board, and the matter was one where the Board was required to act in a judicial manner. That is not the case here. The relevant accusations were made and dealt with in the Magistrates' Court. The panel was not bound to act in a judicial manner in conducting the hearing and making recommendations to the delegate and nor was the delegate acting judicially or quasi-judicially.

113 It follows that I am not persuaded that a fair-minded observer might apprehend that Ms Hughes, had she been the decision-maker or part of the decision-making body, might not have approached the decision to be made under s 84P other than on its legal and factual merits. The plaintiff must not only identify what she says might have led Ms Hughes to approach the question of the fate of Izzy other than on its legal or factual merits, she must also articulate a logical connection between that matter and the feared deviation from a decision on the merits. In the present context, the mere assertion that Ms Hughes had an 'interest' in the question of Izzy's fate by reason of her involvement in the prosecution of the plaintiff does not articulate the relevant connection to establish a reasonable apprehension of bias.

114 Ms Hughes gave instructions to Ms Walsh in respect of the criminal proceedings

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32 (1972) 128 CLR 509.

against the plaintiff and, as a result of those instructions, a number of charges against the plaintiff were withdrawn or downgraded. All of the charges, bar the single charge against Izzy, were attributed to an unidentified dog, so that neither Izzy nor Bub was expressly implicated in the very serious attacks that took place on 9 June 2013, despite the fact that statements obtained by the Council from witnesses to the attacks identify all three dogs as having been involved. In my view, the plea bargain negotiated on instructions given by Ms Hughes was generous towards Izzy. This, in itself, indicates that Ms Hughes did not have any predisposition towards the destruction of Izzy.

115 On the evidence before me, Ms Hughes did no more than to diligently carry out her responsibilities as the Local Laws Co-ordinator, which involved managing the Magistrates' Court prosecutions on behalf of the Council. Although Ms Hughes instructed Mr Martonyi to obtain further evidence in respect of the incident on 4 August 2012, I am satisfied that she did so with a view to clarifying 'which dog did what'.

116 Whether or not Ms Hughes influenced the decision communicated by the delegate, Mr Kourambas, the decision was one that Ms Hughes would have been well qualified to make. A decision under s 84P of the Act is best made by persons who have a practical understanding of what needs to done to protect the community from dog attacks, having regard to the dog's behaviour and temperament, its proposed living arrangements and the steps that can be taken to ensure that it poses no further threat to the community. The starting point under s 84P(e) is that the dog has been involved in attacks on persons or other animals, and that its owner or handler has been convicted of an offence arising from that behaviour.

117 The apprehended bias ground is not made out.

Procedural fairness

118 The plaintiff's arguments on this point are repetitive and confused. They appear to centre on three issues:

(a) The treatment of the 'evidence' of Emily Edward and Jennifer Edward;

(b) The lack of opportunity given to the plaintiff to respond the delegate's belief that she had failed to restrain her dogs; and

(c) The effect on the delegate's decision of the plaintiff not being permitted to keep Izzy at her residence.

119 In final submissions, however, only two contraventions of the hearing rule were expressly identified. They arose from the way in which the panel heard from Emily and Jennifer Edward. The plaintiff complains that:

(a) she was instructed to leave the room so as to be absent during the 'evidence' of Emily and Jennifer Edward; and

(b) she was not given an opportunity to test by cross-examination what Emily and Jennifer Edward told the panel.

120 The plaintiff's complaint therefore focuses on being absent during the Edwards' representations to the panel and on being denied the opportunity to test the Edwards' version of events on 4 August 2012. This was said to be particularly important as the 'evidence' given at the panel hearing by Emily Edward was her third version of events, and was inconsistent with her earlier versions and with the statement made by Jennifer Edward more than a year after the event. It did not appear to have been tested by the panel, and nor was any explanation sought for the inconsistencies in her evidence.

121 The plaintiff accepts that there is no blanket right to cross-examine, but submits that in this case, cross-examination should have been allowed for at least the following reasons:

(a) natural justice does not require the application of fixed or technical rules, but requires fairness in all the circumstances;

(b) where credibility is at issue, cross-examination may be required; and

(c) the plaintiff's property rights were to be negatively affected by the decision of the panel. This should impose upon the panel a greater obligation to afford procedural fairness than a decision making body considering the conferral of such a right.

122 The complaint that the plaintiff was denied a fair hearing because she was not given the opportunity to test by cross-examination what was said by the Edwards is without substance. There is no right to cross-examine unless the decision-maker has the power to compel witnesses to attend and give evidence.[33] In the absence of such a power, cross-examination is possible only with the co-operation of witnesses. In this case, Emily and Jennifer Edward attended the panel hearing not as witnesses, but as the victims of one of the attacks and therefore as persons who might be affected by the Council's decision regarding the fate of Izzy. The Council had no power to require them to be subjected to cross-examination. Nor was such a course necessary or desirable. As I have said, the panel hearing took place against the background of the Magistrates' Court proceedings and the conviction of the plaintiff for offences under the Act. There had been a curial finding of guilt based on the plea and the facts agreed by the parties. One of the agreed facts upon which charge 4 was based and found to be proven was that Izzy bit Jennifer Edward.

123 Furthermore, the panel hearing was not concerned to establish whether Izzy had been involved in the dog attacks or to determine whether she bit Jennifer Edward. It was convened to assist the delegate to decide whether or not Izzy should be destroyed, having regard to whether she could live safely in the community. Mr Melke's submissions correctly focused on how Izzy could be managed in the future, given her temperament and the living arrangements that could be set up for her.

124 As to the plaintiff's absence from the hearing room while the Edwards made their representations to the panel, it is common ground that the plaintiff was requested to and did leave the hearing room. The plaintiff was told that the panel hearing would be 'adjourned' so that the Edwards could attend. After the Edwards made

33 *Maclean v Workers Union* [1929] 1 Ch 602, 620; *Rose v Bridges* (1997) 79 FCR 378.

representations to the panel in the plaintiff's absence, Mr Dickson went through eight points that were raised by them and invited the plaintiff to comment. The plaintiff was thereby given an opportunity to respond.

125 It is submitted that Mr Dickson neglected to tell the plaintiff of the Edwards' concern about the dogs getting out again and that the plaintiff did not have an opportunity to respond to this concern.

126 If this omission constituted an error by the Council, it was not a vitiating error. The plaintiff well knew that her ability to contain Izzy was an issue for the Council. Mr Melke's submissions dealt with this issue, although not in a way that I find particularly clear (due, apparently, to some last minute changes requested by the plaintiff). The plaintiff was informed when she was invited to the panel hearing that consideration would be given, among other things, to 'the potential future risk to the community'. She was aware that the nature and extent of preventative steps taken by her was relevant to any consideration of the exercise of the power in s 84P of the Act. She was aware that, having regard to the interests of the general community, the delegate would consider what steps had been taken by her to prevent future incidents involving the dog and how effective such steps might be. The delegate was not obliged to advise the plaintiff of any adverse conclusion which would have been obviously open on the known material. The fact that the dogs had repeatedly escaped from the plaintiff's backyard was something that was clearly a problem that needed to be addressed by the plaintiff.[34]

127 The delegate did not find that the plaintiff had failed to take any steps to restrain her dogs. Rather, he found that she had failed to take appropriate steps to do so between August 2012 and June 2013, when the dogs escaped again. Although the dogs escaped in June 2013 through wet cement as a result of steps taken (belatedly) by the plaintiff to stop the dogs escaping, no steps were taken prior to that time.

128 Finally, the plaintiff complains that she was not given an opportunity to address the

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34 *Commissioner for ACT Revenue v Alfaone Pty Ltd* (1994) 49 FCR 576, 591-592.

consequences of her not being able to keep Izzy at her residence. It seems to be suggested that had she been able to do so, a dangerous dog declaration could have been made in lieu of a destruction order.

129 In my view, this submission is misconceived. Ms Hughes deposed in her supplementary affidavit that the panel discussed at the conclusion of the hearing Mr Melke's written submission and the possibility of Izzy being declared a dangerous dog and housed with Mr Otto. However, it is apparent from the Reasons that a dangerous dog declaration was not made because, having regard to the attacks on 9 June 2013 in particular, only a destruction order was considered to be appropriate. Although the Council had three options in relation to Izzy – make a destruction order, declare her to be a dangerous dog and do nothing – the letter inviting the plaintiff to the panel hearing made it plain that the option of the dangerous dog declaration would be considered only if no destruction order was made.

130 In any event, the plaintiff had ample opportunity to address Izzy's proposed living arrangements, including the alternative of her being re-housed with Mr Otto or some other person. The written submission prepared by Mr Melke addressed this very question.

131 Procedural fairness required the plaintiff to be given a reasonable opportunity to be heard on the subject matter of Izzy's fate. Such an opportunity was provided. The plaintiff made representations to the panel about Izzy's temperament and behaviour, and why Izzy should be distinguished from Jock. She refuted suggestions that the behaviour of the two dogs was equally serious. Her neighbour, her partner and one of her children spoke to the panel about Izzy's temperament and affectionate nature. Mr Melke's written submission and the report on Izzy by the animal behaviourist were also before and considered by the panel.

132 The plaintiff was not denied a fair hearing. The procedural fairness ground is not made out.

Unreasonableness

133 The plaintiff advanced four bases for the unreasonableness ground, three of which were founded on the proposition that there was no evidence that Izzy bit a person. I have rejected that proposition.

134 The remaining basis for the unreasonableness ground is that even if the evidence showed that the bite on Jennifer Edward was inflicted by Izzy, the Council's exercise of its discretion to order that Izzy be destroyed was unreasonable because the injury to Jennifer Edward was trifling.

135 In *East Melbourne Group Inc v Minister for Planning*[35], the Court of Appeal considered *Wednesbury* unreasonableness and stressed the high threshold required, confirming the well-established principle that, when reviewing administrative action, the court does not engage in a review of the merits of the decision.[36] The Court's jurisdiction centres on determining whether the decision was taken within power, and the Court has no jurisdiction simply to cure administrative injustice or error.[37] Establishing *Wednesbury* unreasonableness requires 'a major step further' than simply establishing an error in reasoning.[38] This is particularly so 'where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste'.[39] The Court of Appeal referred to the formulation in *Wednesbury* itself that called for 'something overwhelming', something 'so unreasonable that no reasonable authority could ever have come to it'.[40]

136 However, the plaintiff relies on passages concerning the relationship between reasonableness and proportionality in the recent High Court decision in *Minister for Immigration and Citizenship v Li*.[41] She submits that two principles may be derived from *Li* that are applicable in this case:

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35 (2008) 23 VR 605.
36 Ibid, 633 [112].
37 Ibid, referring to *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 36.
38 Ibid, referring to *Director of Animal and Plant Quarantine v Australian Port Ltd* (2005])146 FCR 368, 382 [63].
39 Ibid, referring to *Buck v Bavone* (176) 135 CLR 110, 118-19.
40 Ibid 633 [110], referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [148] 1 KB 223, 230.
41 (2013) 87 ALJR 618 ('*Li*').

(a) unreasonableness can arise on the basis of an error of fact; and

(b) an absence of proportionality by reference to the scope of the power can amount to unreasonableness.

137 I have already rejected the proposition that there was no evidence that Izzy bit a person.

138 As to the question of proportionality, in *Li*, the High Court confirmed that administrative discretions must be exercised according to the 'rules of reason'.[42] The Chief Justice observed that a distinction may be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable and that a consideration of the distinction 'might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts'.[43] In this context, his Honour said:

> ... a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions.[44]

139 The plurality also referred[45] to the test of proportionality, stating that an obviously disproportionate response might be one path by which a conclusion of unreasonableness might be reached.[46]

140 I am unable to conclude that the decision to destroy Izzy is a decision that exceeds what, on any view, is necessary for the purpose served by the power in s 84P of the Act. Even if it were permissible for the Court to enter into the merits of the Council's decision in this way, it was clearly open to the delegate to conclude that Izzy ought

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42 See, eg, *Ex-parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 and *Li*.

43 Li 631.

44 Ibid.

45 Albeit in passing.

46 Referring to *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Livestock Corporation* (1990) 96 ALR 153, 167-8 in which Gummow J identified three paradigm cases of unreasonableness thought to be consistent with the *Wednesbury* doctrine, the third of which involved the application of a proportionality analysis by reference to the scope of the statutory power.

to be destroyed.

141 I consider it to be a shame that a healthy young dog that is apparently affectionate towards human beings and a much loved member of the plaintiff's family should be destroyed. However, the way in which the plaintiff put her case before me had an air of unreality about it in that it ignored the fact that Izzy was involved in three attacks on dogs that resulted in injuries to the dogs and their owners. In two instances the owners required hospitalisation. The attacks that occurred on 9 June 2013 were, on any view, extremely serious. The witness statements from persons involved in the attacks on 9 June 2013 describe all three dogs being involved in the attacks (by way of example: 'All three dogs now were attacking Pugsley and were holding by biting onto her ... I was hitting the dogs but they would not let go of Pugsley. Two of the dogs kept pulling and tugging Pugsley away from me. The other dog was pulling Pugsley to the left ... I rolled onto my left side and saw my left hand. It was at this point that I noticed my little finger was just hanging by a bit of skin. I managed to get up on my knees and tried to put my body over Pugsley. All three dogs were still attacking Pugsley and still had hold of her. They were not deterred by my screaming and my trying to fight them off. I was still hitting the dogs with my hands and my knees but they would not let go.')

142 The fact that Mr Melke so adroitly dealt with the charges against the plaintiff by having most of the incidents attributed either to Jock (who had by then been euthanized) or simply to 'a dog' - thus enabling the extent of Izzy's culpability to be limited to the biting of Jennifer Edward, and then only in the context of Jennifer Edward intervening in a dog fight - allowed a rather fragmented picture to be painted that obscured the frightening reality of the attacks.

143 In the circumstances described, there is no basis upon which the Court could conclude that the Council's decision was unreasonable, either in the *Wednesbury* sense or otherwise.

144 The unreasonableness ground is not made out.

Inadequate reasons

145 The plaintiff initially alleged that the reasons are inadequate in that they show that the Council failed to consider whether a dangerous dog declaration was an adequate and/or appropriate remedy.

146 This makes no sense. If the reasons show such an (alleged) error, then they are not inadequate.

147 If the ground is recast to allege that the Reasons are inadequate in that they do not show whether the Council considered whether a dangerous dog declaration was an adequate and/or appropriate remedy, then the ground cannot be sustained either. The Council had three options in relation to Izzy: make a destruction order, declare her to be a dangerous dog or do nothing. The dangerous dog declaration and the 'do nothing' options were to be considered if no destruction order was made. The Reasons make clear that the delegate considered that the circumstances of the attacks compelled the making of a destruction order.

148 The inadequate reasons ground is not made out.

Conclusion

149 The grounds for review are not made out. The proceeding must be dismissed.

CERTIFICATE

I certify that this and the 37 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Emerton of the Supreme Court of Victoria delivered on 17 June 2014.

DATED this seventeenth day of June 2014.

SUPREME COURT OF VICTORIA JUDGE'S ASSOCIATE

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Associate