

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2015-004-000478
[2016] NZDC 4102**

BETWEEN

DALE FRANKLIN JENNER
Applicant

AND

**COMMISSIONER OF NEW ZEALAND
POLICE**
Respondent

Hearing: 8 March 2016

Appearances: N J Taylor for the Applicant
D G Johnstone for the Respondent

Judgment: 15 March 2016

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] This is an appeal under s 62 of the Arms Act 1983 against the decision of the respondent to refuse the issue of a firearms licence to the applicant pursuant to s 24 of the Arms Act 1983.

Background

[2] Mr Jenner obtained a firearms licence in the 1970s. From approximately 1990 onwards he obtained a number of endorsements on his firearms licence, for example, endorsements that allowed him to collect firearms, to possess pistols and MSSAs (military style semi-automatic weapons). In 2005 he obtained a gun dealers licence. This enabled him to import and sell firearms including MSSAs.

[3] Mr Jenner sold two MSSA weapons to an undercover police officer, once on 5 December 2006 and again on 18 December 2006. This was part of a police operation titled "Operation Daisy". On 20 December 2006 a search warrant was executed at his home. Criminal charges were filed.

[4] On 8 November 2007 Mr Jenner's firearms licence was revoked by the police.

[5] The criminal proceedings were resolved and on 31 July 2009 Mr Jenner was sentenced to six months home detention by Judge Harland in relation to two charges of selling the firearms earlier referred to and a \$1000.00 fine in relation to each of two possession charges of those same two firearms and two charges of possession of restricted weapons \$4000 in total. Eleven charges of possession of restricted weapons resulted in a conviction and discharge.

[6] In 2013 Mr Jenner reapplied for his firearms licence. On 10 June he received a notice of consideration to refuse the firearms licence from the police. Further submissions were made to the police. A final decision was issued by the police on 30 September 2013 which refused the firearms licence. This Court proceeding followed.

The law

[7] A person who is refused a firearms licence can appeal that decision to a District Court Judge (see s 62(1) and (1A) (of the Arms Act 1983)). A District Court Judge has the right to vary or reverse the decision appealed against (see s 62(3)).

[8] The appeal is a hearing de novo (following the *Police v Cottle* [1986] 1 NZLR 268 and *Fewtrell v Police* [1996] 14 CRNZ 372. In *Cottle* Holland J held that the onus is on the appellant to satisfy the Court as to his fitness to hold a firearms licence. In *Fewtrell* Justice Goddard held that there was no presumption in favour of the decision appealed from and no onus on the appellant to satisfy the Judge the decision was wrong. The decision in *Fewtrell* followed the Court of Appeal's decision in *Shotover Gorge Jet Boats Limited v Jamieson* [1987] 1 NZLR 437, which

appeal centred on whether the Lakes District Waterways Authority's appeal to the District Court was restricted in scope as one of review only or open to challenge only on limited grounds. The Court of Appeal found that the case was concerned with an unqualified statutory right of appeal from a Local Body Authority to a District Court and that the District Court should hear the case de novo (see *Fewtrell* page 13). It has become routine in these appeals that the approach in *Fewtrell* should be preferred.

[9] In an appeal such as this, I am required to reach my own decision. The test is whether Mr Jenner is a fit and proper person to hold a firearms licence.

[10] Mr Taylor for Mr Jenner submitted that the primary issue was whether Mr Jenner presents a threat to public safety. He elaborated by saying that this required a three-part enquiry:

- (i) is he a risk to himself?
- (ii) is he a risk to someone else?
- (iii) will he sell firearms to others?

[11] Mr Johnstone did not disagree with Mr Taylor on the legal principles to be applied.

[12] The police officer who refused Mr Jenner's application for a firearms licence was at the time the Manager of Operations Support at Waikato District Headquarters. As such he was responsible for the Waikato District Arms Office. He now holds the rank of Inspector.

[13] Inspector Kelly described the catalyst for his decision-making process was the criminal charges and convictions that came out of Operation Daisy. I will refer to this aspect of the matter first.

The events of 2006

[14] In the context of an investigation into illegal sale of MSSA firearms and restricted weapons, the Waikato Police Investigation Team deployed undercover officers and electronic interception and intelligence gathering. During this phase two undercover agents commenced an association with "Mr A" a person who is described as an associate of Mr Jenner. Through Mr A the two police undercover agents were introduced to Mr Jenner.

[15] In July 2006 there were conversations with Mr A about obtaining firearms that the "boys in blue" would not be happy with.

[16] On 22 August 2006 Mr A phoned Mr Jenner to source some "off ticket" firearm for one of the undercover agents. "Off ticket" refers MSSAs or restricted weapons that are not recorded on the police database. Those on the police database record a permit to procure the item to a person who has the appropriate endorsement.

[17] In October 2006 Mr A attempted to sell a fully automatic rifle and an AK47 from a third party to both agents. He took them to examine Mr Jenner's AK47 firearm. The proposed sale did not eventuate.

[18] During the contact of one of these agents with Mr Jenner, Mr Jenner offered to sell the undercover agent a brand new M4 assault rifle with accessory rails and a collapsible stock for a price of approximately \$15,000 - \$16,000 stating the firearm would be available in a few weeks. This sale did not eventuate.

[19] On 5 December 2006 both undercover agents went to Mr Jenner's home. They were shown a list of firearms and price available to be purchased "off ticket" which document was an exhibit in the case. Later that evening one of the agents spoke to Mr Jenner by phone and requested a krinkov AK47 sub-machine gun for \$16,000. There were further phone calls that were intercepted during which there was conversation about the additional purchase of an AK47 assault rifle.

[20] On 5 December 2006 one of the agents purchased saiga semi-automatic shotgun which is an MSSA for \$12,000 cash.

[21] On 18 December 2006 the same agent purchased a norinco AK47 fully automatic assault rifle which is a restricted weapon for \$7,500 cash.

[22] On 20 December 2006 a search warrant was executed at Mr Jenner's home.

[23] As I understand the position there were originally more charges than those for which Mr Jenner was finally sentenced. Because of a number of steps taken in the proceeding it was not until 31 July 2009 that Mr Jenner was sentenced.

The sentencing

[24] The most serious charges were the sale of the two firearms to the undercover police officer. Mr Jenner was sentenced to six months home detention on these two charges. There were associated charges of unlawful possession of the same firearms for which a \$1,000 fine was imposed on each.

[25] There were two charges of unlawful possession of explosives which are categorised as restricted weapons. These were claymore mines and grenades which Judge Harland described as effectively being off ticket. The grenades were for military use and are not legally available for sale and purchase to civilians. The improvised claymore mines were found packaged in a box of five electronic detonators (see paragraph [16] of Judge Harland's sentencing notes).

[26] Then there were 11 charges of unlawful possession of MSSAs. Judge Harland referred to "...some confusion at least was in the firearms fraternity about these firearms...". It had been conceded by counsel for the Crown that for this reason there should be a conviction and discharge in relation to those items. As I understand the case this related to the fact that a basic sporting rifle and an MSSA are very similar in nature. Certain changes to a basic sporting rifle can make it an MSSA. This includes whether the stock is connected to the handgrip or not, a freestanding handgrip is one of the features that can convert a sporting rifle into an

MSSA. Another is the number of rounds in the magazine, seven for a sporting configuration and up to 30 for an MSSA. The addition of a muzzle brake or flash hider can convert a sporting rifle into an MSSA.

[27] In *Lincoln v Commissioner Police* CIV-2009-454-473, Justice Mallon found that the police view of what was a “military pattern freestanding pistol grip” in terms of the Arms Act 1983 was not what the Court found it to be. As a result of that decision there were amendments to the Arms Act post Mr Jenner’s sentencing.

[28] Mr Jenner’s view of the firearms relating to these 11 charges was that because he was a collector he was able to collect and possess restricted weapons. He therefore was of the view that he was able to change the various aspects of a firearm that converted it from a sporting configuration into an MSSA. By pleading guilty he has acknowledged that he was wrong about this although the *Lincoln* case certainly highlights that there was some confusion about the grip in the firearms community.

[29] A second case brought by Mr Lincoln in *Lincoln v Commissioner Police* [2013] NZHC 1813 resulted in a decision (of Pankhurst J) which decided that if you wanted to change a firearm into an MSSA, then you had to have a permit to procure or import the firearm as well as the relevant endorsement (an “E” endorsement). This paperwork is attached to the specific firearm. That decision is said to have clarified matters further.

[30] In the material before me there were numerous photographs taken by the police on the day the warrant was executed on 20 December 2006. Those photographs show the extensive nature of the collection of guns that Mr Jenner owned as well as numerous associated items. By associated items I mean explosives, ammunition, helmets, uniforms, bayonets, gun accessories and the like. Most of the items were secured in a secure lockup facility underneath Mr Jenner’s house. However some items, including explosives were found in the garage albeit it was locked. This storage was not in accordance with the regulations. Of particular concern to the police was the fact a shotgun with cartridges was found in a wardrobe inside a bedroom in the house.

The position of the police in this appeal

[31] In addition to the convictions in 2009 including the nature of the offending, the police have additional concerns. They include:

- (a) the way in which the shotgun was improperly stored in the house;
- (b) grenades and other explosive devices found at Mr Jenner's property;
- (c) the fact that since 2009 Mr Jenner has remained active within the community of firearms traders and enthusiasts, he has been importing and selling accessories for firearms and airguns;
- (d) two letters that Mr Jenner wrote to the police in May and June 2011 which Inspector Kelly described as causing him concern about Mr Jenner's state of mind and attitude towards authority and the Government of New Zealand;
- (e) that in May 2012 Mr Jenner was stopped by an uniformed police officer in relation to a traffic matter during which it was ascertained that he was still in possession of his firearms licence and had two rifle bags with soft airgun rifles and one soft airgun pistol which the officer considered to be in breach of the notice revoking his firearms licence and an offence against s 49A of the Arms Act (noting that no charges were laid as a result of this incident but a warning was delivered);
- (f) that a New Zealand Customs advice to police about a shipment of accessories Mr Jenner was importing in April 2013 raised concerns as did the fact that Mr Jenner was still selling and importing gun accessories into New Zealand.

The case for Mr Jenner

[32] Mr Jenner's position is:

- (i) for 30 years prior to 2006 he held a firearms licence without incident;
- (ii) apart from the charges arising out of the events of November and December 2006 he has no previous convictions and has not been convicted of any other offences since;
- (iii) that he has accepted what he did was wrong and is very sorry it has occurred;
- (iv) that he has paid the price for what he has done
- (v) that he feels he has changed in terms of his attitudes;
- (vi) that he otherwise has a safe record of handling firearms including that others support his view that he is a safe person around firearms;
- (vii) that hunting and target shooting has been a way of life for him;
- (viii) that the letters he wrote in May and June 2011 were tongue in cheek and do not give rise for any cause for concern about his being granted a firearms licence;
- (ix) that he has paid a very heavy price for what happened in 2006 because it affected his lifelong hobby, it has affected his family life and resulted in the loss of many friends.

The issue in this case

[33] The sole issue in this case is whether Mr Jenner is a fit and proper person to hold a firearms licence (see s 24(1)(b) Arms Act 1983). I agree with three parts to this as enunciated by Mr Taylor (see para 10 herein) and I intend to approach the matter in that way.

Is Mr Jenner a risk to himself with firearms?

[34] This generally refers to whether the person might harm themselves with firearms. This was the position in *McCabe v New Zealand Police* Timaru District Court CIV-2008-076-000345 (interim judgment dated 30 January 2009) where Judge Neave noted that a suicide note written by Mr McCabe was the concern. His Honour found that the note was in the context of consumption of an excessive amount of alcohol and in the context of domestic disharmony and that it was a one off.

[35] Here the only issue of concern raised about Mr Jenner's state of mind is in relation to the letter he wrote to the Police Arms Officer on 7 May 2011. In fact it appears that the letter was commenced on that date and was sent after the date at the end of the letter which is 24 May 2011. So on the face of it a letter written over a period of 17 days. It runs to five full typed pages of A4 paper.

[36] As I said during the hearing it is a kind of letter that makes a Judge's heart sink when one sees one because it is often impossible to make sense of it. That is because it contains statements that challenge the legitimacy of the government and in this case the status of the New Zealand Police. For example:

It is my understanding that the Commissioner New Zealand Police, the Corporation as opposed to the "Police of New Zealand, the Public Service" has a Commissioner legally appointed with no authority. Therefore all the "NEW ZEALAND POLICE HAVE NO AUTHORITY".

It is my understanding that the Commissioner of the Police of New Zealand was appointed by the Queen's Governor-General. Whereas Howard Broad was appointed by Annette King Minister of Police and Helen Clark, the then Prime Minister.

[37] It then goes on to challenge the status of the government:

It is my understanding, there is no formal job description for the role of Prime Minister. The Cabinet's office manual states that the "Prime Minister is the Head of the Government", there is no statute or law which establishes the office or defines the role.

It is my understanding that prior to the Executive Council dismissing the Queen's Governor-General. They are all Commissioners of Police, Ministers of Police and Prime Ministers had to be sworn in by the Queen's Governor-General.

[38] Then there is a heading entitled 'Claim of Right' and one paragraph of that section of the letter says:

The Law and Equity Act are in fact in the profitable business of conducting, witnessing and facilitating the transactions of security interests and I further claim they require the consent of both parties prior to providing any such services.

[39] Mr Jenner explained that he had obtained much of this material from the internet. That said there is clearly a theme to the letter amongst all this gobbledygook which is a challenge to the legitimacy of a letter written by the Arms Officer to Mr Jenner dated 21 February 2011. This is essentially around whether "airguns" are the same as "air soft toys" as Mr Jenner called them. Airguns are defined as firearms in terms of the Arms Act 1983. Mr Jenner had been using and in fact importing air soft guns which fire plastic pellets and which he regarded as toys. He felt that when the officer wrote to him and said that air soft guns were airguns and that he was not authorised to sell, possess or have access to them, the officer was wrong.

[40] The officer's letter dated 21 February 2011 refers to an approach to him by Mr Jenner to confirm whether he would be contravening his firearms licence revocation notice, if he imported and sold certain items. This included air soft guns using electric driven working parts and accessories for them, accessories and parts for A category firearms and accessories and parts for MSSAs or pistols.

[41] Officer Plas said in his letter of 21 February 2011 that he had consulted with Firearms Licensing at Police National Headquarters and had been advised:

- (i) air soft guns are air guns and as such he (Mr Jenner) was not authorised to sell, possess or have access to these;
- (ii) that Mr Jenner was able to import accessories for category A firearms but not to import any items which make a firearm an MSSA or restricted weapon.

[42] Mr Jenner took issue with whether air soft guns are airguns. This is the theme that he challenges in his letter of May 2011.

[43] Because the officer did not reply to Mr Jenner's letter of May 2011, Mr Jenner wrote another letter on 7 June 2011 in which he assumes that the officer agrees with the content of his letter of 7 May 2011 for example:

You have agreed by your non rebuttal and tacit consent that popguns, nerf guns, bike pumps, paintball guns, soft air guns and accessories are not weapons for firearms, or real guns but toys and accessories. Therefore I am allowed to own, use and sell such items.

[44] Mr Jenner described this as "tongue in cheek" and acknowledged when cross-examined that he was pretty mad about not being able to import and sell air soft guns.

[45] The concern of the police here is that these two letters are part of a continuing pattern of behaviour that shows an anti-police attitude and a concern about Mr Jenner's state of mind.

[46] There is no medical evidence to suggest Mr Jenner is mentally well or mentally unwell.

[47] Mr Jenner presents as someone who is intelligent and articulate and was a well respected member of the community until the events of December 2006 and its aftermath. A number of the friends he has met through his love of shooting have remained loyal to him. They all spoke highly of his personal qualities and gave the clear impression they were all stunned to discover he did what he did.

[48] It was also apparent that he has suffered greatly in terms of the loss of his sporting interest in shooting, his status in that community and his reputation generally.

[49] Apart from feeling ashamed embarrassed and regretful about what has occurred I could not determine any real prospect that Mr Jenner is a threat to himself from firearms.

Is Mr Jenner a threat to others?

[50] Another issue that is of concern to the police is the extent of Mr Jenner's genuine remorse about his offending. Inspector Kelly's view was that Mr Jenner regretted the effect of his offending on his life as opposed to Mr Jenner having regrets about his actions. He agreed following a question from me, that he did not feel Mr Jenner had adequately shown an acceptance that what he did was wrong. Inspector Kelly's concern about the anti-police attitude is connected to the fact that police need to be able to interact with people who have firearms licences.

[51] Mr Jenner was asked a number of questions in cross-examination about whether he felt "set up" by the police. This is coming from the perspective that the charges arise out of the fact that he sold two restricted weapons to undercover police officers. (As Mr Taylor put it "but for" the actions of the other police officers there would have been no criminal charges.)

[52] In response to the comment about whether he was set up by the police Mr Jenner said:

I couldn't comment on that 'cos I don't know, I wasn't party to what they were about. All I knew is that I was very stupid...

[53] Mr Jenner elaborated as follows when he was asked if he felt it was not his (Mr Jenner's) fault:

No, it was certainly my fault, I've admitted my fault, I shouldn't have done and I paid the price for it (see page 24 notes of evidence "NOE").

[54] A number of people who know Mr Jenner from the firearms or shooting community supported him. The view of his supporters was that Mr Jenner was very sorry for what he had done. .

[55] Mr Norgrove knew Mr Jenner over a period of 18 -20 years both in a work capacity and as a fellow member of the Waikato Rifles Club. He said that he believed Mr Jenner was really really sorry and really regretful about what he did.

[56] Mr Tony Reid who is also involved in the sport of shooting said in his conversation with Mr Jenner about what had happened that Mr Jenner kept saying how stupid he had been.

[57] Ms Romy Field whose partner is involved in shooting and gun shows gave evidence that Mr Jenner said to her he was really really sorry and really regretful about it.

[58] Mr Roland Field who has been involved in shooting and collecting cartridges for a long time said that he believed Mr Jenner was a man who was "well aware that he had done something unwise, stupid and someone who is very regretful that he did such a stupid thing. He said "I mean he knows it was dumb and so do lots of other people. And it is the sort of things that for the rest of his life he will regret".

[59] Mr Johnstone in submissions pointed to the months leading up to the sale of the firearms to the undercover police officers. That submission was directed to the fact that Mr Jenner did not make a spur of the moment decision to sell the two firearms to the undercover police officers. Mr Jenner gave evidence that made some assumptions about the character of the two persons he believed were genuinely wanting to purchase off ticket MSSAs or restricted weapons from him as being persons of good character. It was apparent that he knew it was wrong to sell guns to people in the criminal fraternity and it can be inferred that he would not knowingly do so.

[60] I agree that Mr Jenner's expressions of regret may not go as far as appreciating the possible consequences of his actions. Meaning the actual or potential downstream effects from selling lethal firearms to an unlicensed person. Telling yourself the two men in front of you are of good calibre from the way they looked and that they were not criminals because they were not covered in tattoos or gang paraphernalia is naïve to say the least.

[61] The gun licensing regime is in place to ensure that firearms are in the hands of people who will act responsibly in relation to them and will not put the public at risk including by allowing firearms to get into the hands of people who should not

have them. Someone in Mr Jenner's position with his long association with the sport of shooting and collecting firearms and associated items should know this better than most other people.

[62] Mr Jenner is not able to explain why he was prepared to sell the two firearms to persons he knew were unlicensed to own them. What he did say is the large sum of money he was offered for them. At para 16 his affidavit stated:

...they were offering me far above the market rates and so I foolishly agreed to sell them to them. I was lured by the prospects of extra money.

[63] Mr Jenner prepared a list of firearms he said he could supply to these men (which was in exhibit) and he set the price; both the wholesale price and retail price. To say that he was **offered** large sums of money for them is disingenuous.

[64] The next issue is the firearms charges and other issues that give rise to a concern that Mr Jenner was not observing the rules around the safekeeping of firearms and other restricted weapons. These include:

- ♦ the fact the he had possession of restricted weapons (the grenades and claymore mine) which he was not authorised to have
- ♦ the fact the explosives were stored in his garage rather than in the more secure area underneath the house
- ♦ the fact that he had a shotgun and cartridges for it in wardrobe in a bedroom in the house

This was discovered when the search warrant executed on 20 December 2006. These factors indicate to me that Mr Jenner either did not completely understand the rules around safety of firearms and other restricted weapons or had become lackadaisical about it. Whichever it is, it does give rise for concern in my view.

[65] As already mentioned Mr Jenner had a huge collection of firearms, restricted weapons and associated items. It may well be that when someone has such a large collection it is easy to become a little blasé about the way in which items are stored.

The importance of observing the law around the storage of firearms is vital because they are designed to maintain safety to other persons and a natural consequence of this is whether the Court can have confidence that Mr Jenner will properly observe the law in relation to the storage of a sporting rifle if he is granted a firearms licence.

[66] It is important also to consider Mr Jenner's track record of safety around the use of firearms when they are used. There is no evidence that he is not safe around firearms. Indeed there is a weight of evidence to the contrary which comes from people who support his application all of whom impressed me as to their good character and reliability. Every one of them said that they believed that Mr Jenner was safe around firearms. In particular Mr Reid said that he shoots with a friend who is ex-British army. Both Mr Reid and his friend had sons who wanted to join them. The Waikato Rifles Club was chosen for this purpose because of the safety measures in place at that range which Mr Jenner as the Chief Range officer was largely responsible for.

[67] Mr Jenner held a firearms licence for 30 years without incident or accident prior to December 2006. He was well regarded within the sport of shooting including for his record of safety around firearms. This leads me to the view he will not be a risk to others when using a firearm.

[68] One would expect that the concerns around storage referred to earlier should improve dramatically after what happened in December 2006. Mr Jenner is now in no doubt about the consequences of not adhering to the law around firearms safe storage. He very much wants his firearms licence back so he can return to his favourite sport. I am satisfied that he will not do anything to put that in jeopardy.

[69] The risk of illegal possession of the explosives will not arise if Mr Jenner has a category A firearms licence as it will only allow him to possess a rifle in a sporting configuration.

[70] The incident in May 2012 does Mr Jenner no credit. The officer stopped Mr Jenner because he was not wearing a seatbelt. The ensuing exchange appears from the police point of view to have escalated into something it did not need to.

With Mr Jenner becoming annoyed and rude to the officer unnecessarily. When various aspects of the incident recorded on a job sheet were put to Mr Jenner his denials were weak. For example "I don't recall" or "I may have said something like that". My view of this incident is that the officer was doing his job and Mr Jenner over-reacted.

[71] I refer to the police concern about Mr Jenner's continued involvement in selling firearm accessories and his involvement on the edges of the shooting community and interest in air soft guns. His dealings in these activities have not resulted in changes. I view this as an attempt by Mr Jenner to remain involved in the sport and to maintain friendships. I do not view it as concerning.

Is Mr Jenner Likely to sell guns to other people?

[72] Mr Jenner has always known and still knows that it is illegal to sell firearms unless he is a licensed gun dealer. The return of his firearms licence would not entitle him to sell firearms. I am of the view that Mr Jenner is very unlikely to breach the terms of a category A firearms licence because of the severe consequences he has had to endure as a result of his unlawful actions, the sentences imposed and the revocation of his firearms licence.

Summary

[73] It is now two years and nine months since the police began the process of declining Mr Jenner's 2013 application for a firearms licence. At that time the letters of 2011 and the police stop of May 2012 were reasonably recent history. When those events are viewed against the background of the events of late 2006 and the convictions entered in 2009, I do understand the reluctance on the part of the police to grant Mr Jenner's application for a firearms licence in 2013. More time has passed since then.

[74] Mr Jenner described himself as being a different person now. He described himself as being a lot more philosophical. I took that to mean he has come to terms with what occurred in December 2006. He understands what he did was wrong.

There have been far-reaching consequences for him and his family. And that indicates to me he is very unlikely to break the law again.

[75] I find Mr Jenner is a fit and proper person to hold a firearms licence.

Result

[76] The appeal is successful.

[77] If the parties are unable to settle any issues as to costs they may file memoranda within 21 days.

Dated at Auckland this 15th day of March 2016 at . 2 : 30 am/pm

A handwritten signature in cursive script, appearing to read 'P A Cunningham'.

P A Cunningham
District Court Judge