IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-001949
[2024] NZHC 3551

UNDER THE	NEW ZEALAND BILL OF RIGHTS ACT 1990
BETWEEN	DIRK WILLEM DE BOER Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	24 September 2024 Further submissions 8 and 22 October 2024
Appearances:	G E Minchin for Appellant A P Lawson and R Gavey for Respondent
Judgment:	5 December 2024

JUDGMENT OF WHATA J
Appeal

This judgment was delivered by me on 5 December 2024,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors / Counsel:
Exeo Legal, Auckland
G E Minchin, Auckland
Crown Law, Wellington

[1] Mr de Boer submitted in opposition to the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill 2019 (the Bill). He made a Facebook post referring to his .22 calibre rifle with a built-in magazine that would become unlawful if the Bill became law. An informer emailed the police about this, attaching a partial screenshot of the post. Several months later, after the Bill was passed into law and the specified amnesty period had expired, the police applied for a search warrant to search Mr de Boer's home. The application, among other things, attached a copy of the screenshot and included information that identified Mr de Boer as the "co-founder" of a "right-wing political group" with the following statement:

> It should be noted that this in itself is not information that supports my suspicion of firearms related offending, however when observed in the context of DE BOER'S post about his lever action rifle it does indicate a high level of dissatisfaction with the amendment of the Arms Act. This level of dissatisfaction could possibly result in an intent to keep the prohibited firearm/magazine.

[2] A search warrant was then issued to search Mr de Boer's home for the rifle. They did not find one. Mr de Boer sues them for trespass, breach of the New Zealand Bill of Rights Act 1990 (NZBORA) and abuse of process. His claim failed in the District Court.[1] This is his appeal.

A problem

[3] During the course of the hearing before me, a problem with the warrant application assumed prominence. The screenshot of the post included in the application was not a complete copy of that post. It omitted to include the following comment that appeared immediately under the picture of the rifle:

[1] *de Boer v Attorney General* [2023] NZDC 15478.

[4] In my view, this was a serious omission. The post taken as a whole was clearly an expression of political speech inviting participation in the legislative process. It casts doubt on the reasonableness of an inference sought to be drawn by the police that his dissatisfaction could possibly result in an intent to keep the prohibited firearm. On the contrary, it suggests that Mr de Boer is actively seeking to promote engagement in the democratic process in a way that is consistent with the maintenance of the rule of law, rather than an intention to derogate from it.

[5] While the decision of the District Court was, with respect, otherwise faultless, I am unable to agree that the overt engagement with the Select Committee process was an irrelevant consideration.[2] On the contrary, the omission of this key material meant that the process fundamentally miscarried. I am not however persuaded that this is a case that attracts damages. There was no bad faith. The omission was simply an unintentional mistake and the search was not unreasonable. Accordingly, a declaration of invalidity and breach of s 21 of NZBORA is sufficient to vindicate Mr de Boer's rights. These are my reasons.

Background

[6] The police searched Mr de Boer's house on 9 January 2020, pursuant to a search warrant. The grounds of the application for that search warrant were helpfully summarised in the District Court judgment as follows: [3]

> …
>
> (a) On 3 April 2019, the plaintiff made a post on his Facebook social media platform that consisted of a photo of a lever-action rifle with blue (dark colour) metal and a brown wooden stock. (Facebook Post). The caption of the Post read:
>
> > This is my .22 calibre lever-action rifle, a low calibre replica of the famous 19th century cowboy gun – "the gun that won the west".
> >
> > Under the Arms Act Amendment Bill (aka Tarrant's Law) before parliament, this will become a PROHIBITED FIREARM as the tube magazine holds the industry standard of 15 cartridges.

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2 At [65].
3 At [4].

> This law change isn't about public safety, this is simply a far-reaching gun ban that certain nefarious elements of the political underclass had waiting and ready to go, all that was needed was a tragedy of significant proportions to exploit.
>
> There are 119 despicable individuals in parliament who voted to give around 48 HOURS of public consultation on their gun grab which makes a mockery of the democratic process.

(b) The Facebook Post was accessible to all members of the public.

(c) It came to the attention of police on 5 October 2019 following an email from an informer who wished to remain anonymous (the Informer's Email).

(d) The Amendment Act had been passed and this had made the firearm a prohibited weapon, as it had a magazine capable of holding more than 10 cartridges. Owning such a weapon was now an offence liable on conviction to imprisonment for a term not exceeding 3 years.

(e) On 20 December 2019 the amnesty under the Amendment Act for newly prohibited firearms, magazines and parts finished.

(f) Police had no record of the plaintiff handing in any firearm as part of the buyback process.

(g) It was therefore likely that the identified weapon was still in the plaintiff's possession, and the plaintiff was therefore committing the identified offence.

(h) The plaintiff was the co-founder of a right-wing political group described in the warrant. Detective Constable Michael Dunn states in the application:

> It should be noted that this in itself is not information that supports my suspicion of firearms related offending, however when observed in the context of DE BOER'S post about his lever-action rifle it does indicate a high level of dissatisfaction with the amendment of the Arms Act. This level of dissatisfaction could possibly result in an intent to keep the prohibited firearms/magazine.

(i) The plaintiff has a category A firearms licence.

(j) A home inspection of the plaintiff's property in 2016, a requirement of his firearms licence, recorded that the plaintiff owned a firearm that matched the description of the firearm in the Facebook Post.

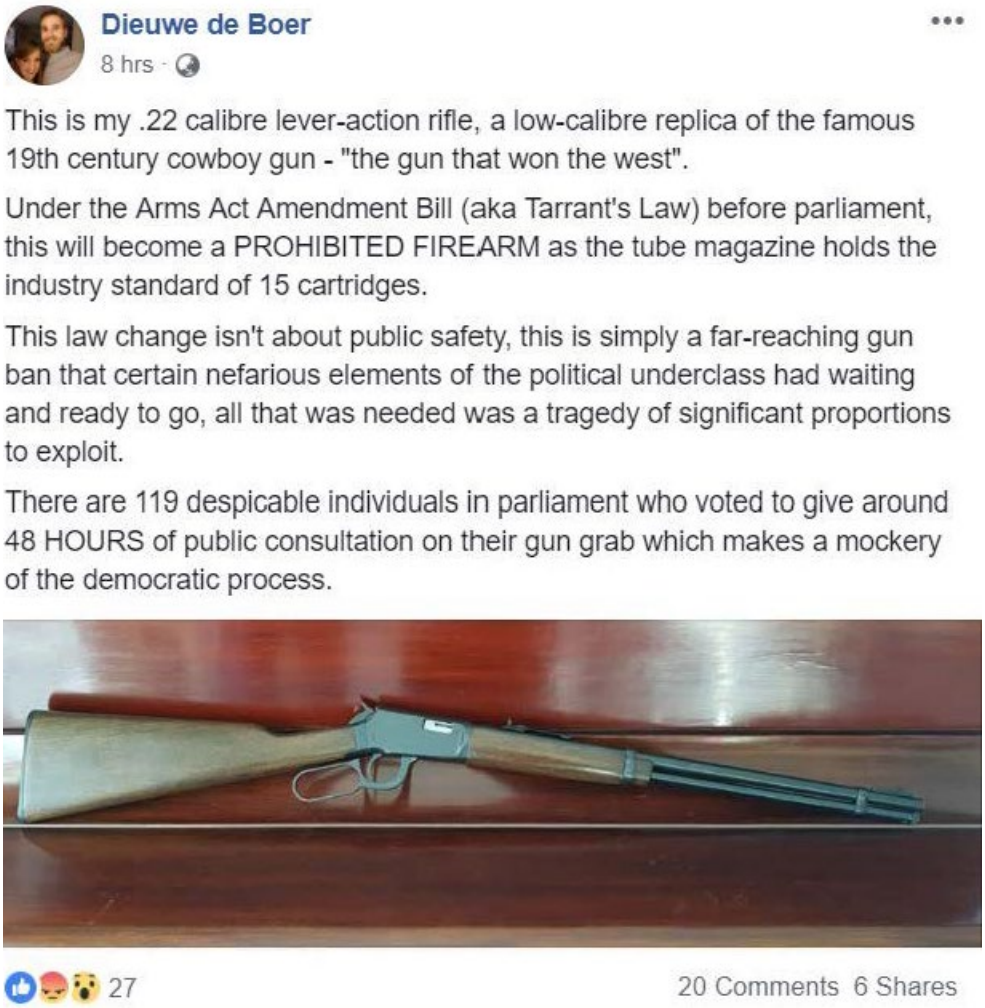
(k) As the plaintiff had not handed in the weapon, it was likely that it was still stored at his home address.

(1) Where the plaintiff lived at the time of this home inspection was consistent with the address for him recorded on Land Information

New Zealand and the address to which his car was registered. Council records showed that the plaintiff was one of the people named on the title for the property. As a firearms licence holder, the plaintiff was also obliged to inform police of any change in address.

(m) On 8 January 2020, a police officer drove past the plaintiff's home and recorded the registration numbers of the cars parked in the driveway. The cars were registered to members of the plaintiff's family.

[7] A copy of the Facebook post specifically identifying the gun attached to the application reads:



[8] As noted, it transpires that this was not a complete copy of Mr de Boer's Facebook post. The post also included a comment from Mr de Boer as follows:

Mr de Boer's claim

[9] Mr de Boer's statement of claim includes three causes of action based on:

(a) trespass;

(b) breach of NZBORA; and

(c) abuse of process.

[10] The trespass claim alleges:

(a) nine months had elapsed between the time Mr de Boer publicly referred to his possession of the magazine and submission to the Select Committee, and the execution of the warrant;

(b) when seeking the warrant, the police disclosed no other evidence of the magazine ever having been in Mr de Boer's possession;

(c) the plaintiff is a licensed firearms owner with no criminal convictions who had publicly stated his awareness that the rifle and the magazine would be a prohibited item under the amendments coming into force;

(d) the information contained in the warrant was subject to parliamentary privilege;

(e) the police did not disclose in their application that they were targeting a person who had politically opposed the changes to the Arms Act 1983, which the police had sought; and

(f) there were no reasonable grounds for the police to believe that the rifle was still in his possession.

[11] In relation to the breach of NZBORA, he claims that as the search was unreasonable it breached s 21.

[12] The abuse of process claim is based on the following allegations:

(a) New Zealand Police was the primary instigator of the amendments to the Arms Act, by which the magazine was prohibited;

(b) Mr de Boer was politically opposed to the amendments to the Arms Act, which included making a submission referencing the rifle and the magazine to the Select Committee;

(c) during the investigation police accessed Mr de Boer's submission to the Select Committee in breach of parliamentary privilege;

(d) the police targeted Mr de Boer and searched his home as he was a political opponent of the police's policies in regard to the Bill; and

(e) the police did not disclose in their application for a warrant that they were targeting a person who had politically opposed changes to the Arms Act sought by New Zealand Police.

District Court judgment

[13] The claim came before Judge A A Sinclair. In summary, the Judge addressed the following key matters:

(a) the involvement of Police National Headquarters (PNHQ) in the search warrant process;

(b) whether the Police investigation was unreasonable;

(c) whether relevant information was omitted from the warrant application; and

(d) breach of parliamentary privilege.

[14] The Judge made the following finding in respect of the involvement of the PNHQ:

> [38] It is not in dispute that there was no response to the email that forwarded the Informer's Email to the two PNHQ email addresses. In addition, there is no evidence of any further engagement between PNHQ and the Manukau police officers ultimately tasked with carrying out the investigation.
>
> [39] As Ms Lawson submits, the team to be assigned to particular investigations is an operational matter for police to decide. Importantly, I do not consider that bad faith/improper purpose can be inferred from PNHQ not responding to the Informer's Email. Looking at the totality of the circumstances, I am satisfied there is no evidence supporting the plaintiff's assertions of bad faith and proper purpose by police officers at PNHQ.
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> [40] Likewise, I do not accept that it can be inferred from the actions of the police officers who were assigned in Manukau to investigate the Informer's Email that they acted in bad faith in applying for a search warrant and carrying out a search at the plaintiff's home.

[15] In terms of the claim that the police investigation was unreasonable, Judge Sinclair identified the key contentions made by Mr de Boer as follows:

> [49] The plaintiff submits that the police investigation into the Informer's Email was unreasonable in the following respects:
>
> (i) The investigation should have been dealt with by PNHQ or at least, that PNHQ should have engaged with the issue.
>
> (ii) Police should have spoken to the plaintiff to ask about the prohibited firearm rather than seeking a search warrant.
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> (iii) Police failed to independently review the plaintiff's Facebook Post;

(iv) Police failed to identify that the Facebook Post was linked to the plaintiff's Select Committee submission;

(v) Police were mistaken in considering that the plaintiff had not informed police of his change of address, as required by the conditions of his firearms licence.

[16] In dealing with these matters, the Judge noted:

> [51] The assertions made under (i) and (ii) have already been considered. With regard to (iii), the Court heard evidence from Detective Constable Dunn in relation to the review of the plaintiff's Facebook page. He explained that Constable Solomona was tasked with conducting enquiries on Facebook. Constable Solomona emailed Detective Constable Dunn and Detective Sergeant Gemmell on 8 January 2020 about this and attached various screenshots from the plaintiff's Facebook page and websites. This included a copy of the Post identified by the informant. I accept this evidence and am satisfied that police did independently review the plaintiff's Facebook page to check the reliability of the screenshot of the page provided by the informer.
>
> [52] With regard to (iv), identification of the Select Committee submission, the plaintiff contends that despite accessing the plaintiff's Facebook homepage, the defendant's assertion that the link to this Select Committee submission was not seen by police is "inherently implausible".
>
> [53] The plaintiff produced a copy of a screenshot of the Facebook Post. The date of the screenshot is not known and therefore it is unclear whether this is what police would have seen when reviewing the plaintiff's Facebook page.
>
> [54] The screenshot shows that at some time the plaintiff added a comment on his own Post stating: "submissions close at 6.00pm tonight" and providing a link to the page on Parliament's website where people were able to make a submission on the Bill. I accept the defendant's contention that this comment does not on its face, indicate that the plaintiff had made a submission to the Select Committee, rather it appears to invite others to do so.
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> [55] Finally, and importantly, as discussed above, it was Detective Constable Dunn's evidence that he was not aware of the plaintiff's Select Committee submission when applying for the search warrant. I found Constable Dunn to be a credible witness and I accept his evidence.
>
> [56] With regard to (v), the plaintiff's change of address, an issue arose as part of the investigation as to whether the plaintiff had notified a change of address. The evidence was that Detective Constable Wecks was tasked with making enquiries about the plaintiff with the Arms office. An email was received stating that the plaintiff had not notified the Arms office when he changed addresses in early April 2016. The plaintiff produced evidence to show that this was incorrect, and that he had in fact notified his change of residence as required.
>
> [57] The plaintiff appears to allege that the mistaken impression that he had not updated his address as required, tainted the investigation and/or the search warrant. I do not consider that there is evidence to support such an

> allegation. Importantly, there is no mention in the search warrant application as to whether or not the plaintiff has updated his address.
>
> [58] I do not consider that any of the above assertions have been established and I am satisfied that the police investigation was not unreasonable in any of the respects identified or indeed, in any other respect.

[17] A claim that relevant information was omitted was also rejected by the Judge. More specifically, the Judge did not accept that:[4]

(a) the police should have referred to Mr de Boer's submission to Parliament, repeating her finding that they did not know about it;

(b) the statement in the warrant that the informer wanted to remain anonymous was misleading, noting that the "Informer's Email" clearly comes within the definition of informer in s 64 of the Evidence Act 2006, given that they were supplying information to police concerning the possible commission of an offence and to communicate it through the use of the term anonymous, that their identity was not to be disclosed;

(c) the "Informer's Email" was the foundation of the application, observing that it was simply the trigger for the investigation that followed; and

(d) the possibility of the rifle being modified to make it compliant should have been included in the application, the Judge reasoning that it was unlikely the warrant would not have been issued even if this information had been included.

[18] Finally, the Judge found there had been no breach of parliamentary privilege, finding that the police did not see Mr de Boer's comment on his Facebook page linking to the website for people to make a submission on the Bill and rejecting the contention that there was an overlap between Mr de Boer's Facebook comment and his submission to the Select Committee.[5] The Judge also made the point that statements

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4 From [63].
5 From [81].

made in Parliament do not enjoy privilege if repeated outside of Parliament, citing *Buchanan v Jennings.*[6]

[19] Having found no unreasonableness, and no breach of NZBORA, the Judge accordingly found that the trespass claim must also fail.

Discovery and interrogatories judgments

[20] A feature of the present appeal is a claim that Mr de Boer should have been afforded access to documentation or information that might show the involvement of PNHQ in the warrant application process. Mr Minchin says this is important in terms of his bad faith claim. It is necessary then to briefly address the judgments refusing related applications for discovery and interrogatories.

[21] Dealing first with the discovery judgment, the background is helpfully described in that judgment as follows:[7]

> [1] The plaintiff filed an application for further and better discovery by the defendant dated 13 July 2021. The application included a number of specific discovery requests but in the event, the application proceeded in relation to only two items. These requests are described in the application as follows:
>
> (i) The record of all those who accessed the plaintiff's file in the National Police Application (NIA) database, which was created when police received information that alleged he had possession of a firearm liable to confiscation; and
>
> (ii) The above [informer] email has "PNHQ" (Police national headquarters), in the subject line. If the informer also sent this email to Police national headquarters, discovery is sought of this email and any forwarding of this email or other documents relating to it. Alternatively, if Counties Manukau Police forwarded the informer email to Police national headquarters, a copy of this email and any forwarding of this email or other documentation relating to it.
>
> [2] With regard to the request for the database record, Mr Minchin asserts that it is alleged in this proceeding that police targeted the plaintiff for opposing legislation the Police had sponsored and endorsed. If there was an evidential basis for such an allegation, the plaintiff could plead this as an aggravating factor. He contends that discovery of this record would show who had accessed the plaintiff's file and their position within the New Zealand

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6 At [87] citing *Buchanan v Jennings* [2004] UKPC 36, [2005] 1 AC 115 at [13].
7 *de Boer v Attorney General* [2021] NZDC 16491.

> Police would indicate their level of involvement. Further, Mr Minchin submits that it is possible that the decision to search the plaintiff's home was made at a national level which would again be an aggravating factor that could give rise to an award of punitive damages.

[22] The basis for the claim for discovery was the assertion that the police targeted the plaintiff for opposing the Bill. It was submitted at the time that if there was evidential basis for such an allegation, the plaintiff could plead this as an aggravating factor. That would give rise to a claim for punitive damages. Dealing with each of the claims the Judge found:

(a) Database record — information as to the persons who viewed Mr de Boer's file on the NIA is not relevant as to whether the search was unreasonable or unlawful. Furthermore, the request for a database record is, in effect, a request to develop a record for inspection and therefore falls outside the scope of discovery.

(b) Emails — the Judge repeated that the starting point for determination relates to the issue and execution of the warrant. The police accepted that any documents which indicate any sort of direction from PNHQ in relation to the issue of the warrant would be relevant. Thus, if they existed, they would be discovered. The Judge noted that Mr de Boer had not identified any particular documents or class of documents which he contends had not been discovered by the police and it was not sufficient to make a general allegation of this kind.

[23] The interrogatories judgment of Judge Harrison, dated 20 January 2022, refused the application on the basis they were not relevant and were oppressive.[8]

Threshold for appeal

[24] Mr de Boer bears the onus of satisfying me that I should come to a different decision to the one under appeal. Only if I consider the decision under appeal is wrong, is there any basis for interfering with it. I must, however, undertake my own assessment of the merits of the case and no deference to the decision under appeal is

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8 *de Boer v Attorney-General* [2022] NZDC 766.

necessary apart from the customary caution in dealing with the evidence of witnesses where, for example, credibility is in issue.[9]

Issues on appeal

[25] The main issues on appeal are:

(a) whether the police acted in bad faith;

(b) whether the police had a reasonable basis for the search warrant; and

(c) whether the search was unreasonable.

[26] I will deal with each claim in turn. Before moving to those issues, Mr Minchin initially advanced concerns about both the discovery and interrogatories judgments. However, on further discussion it was clarified that he did not in fact seek to challenge the decision to refuse interrogatories, but rather wanted to highlight that it was based on a failed discovery application, when in fact Mr de Boer succeeded in obtaining further discovery by agreement. I indicated, however, that I could not hear an appeal on the reasons given in the interrogatory if the decision itself was not under appeal, and it seemed to me that the discovery issue was somewhat redundant. Mr Minchin then indicated he was content to withdraw those aspects of this appeal.

Bad faith

[27] In relation to the bad faith claim, Mr Minchin's key contentions for Mr de Boer are:

(a) Having denied Mr de Boer's application for discovery about the processes followed by the police, the District Court Judge should have considered inferences that supported a finding that the decision to search Mr de Boer's house was instigated by PNHQ targeting him for his opposition to amendments to the Arms Act.

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9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].

(b) The Judge erred in finding that the police could rely on the informer's email in their search warrant application, but not provide the judicial officer with the text of the informer's email.

(c) The Judge erred in finding that police did not give the judicial officer the false impression that the informer was anonymous in order to not reveal the hostility evident in the informer's email.

[28] Ms Lawson for the Crown submits that there is no proper basis for finding bad faith. She make the following key points:

(a) Several of the points made by Mr de Boer were raised only after evidence was exchanged and shortly before the hearing, so the police never had an opportunity to respond to those points.

(b) There is no proper basis for inferring that PNHQ or the officers were dishonest or misleading, had an improper purpose, deliberately breached their duties, or intentionally or deliberately disregarded Mr de Boer's rights.

(c) There were no relevant omissions or misleading statements in the search warrant application.

Assessment

[29] It is common ground that:[10]

(a) bad faith is usually associated with dishonest, misleading conduct, improper purpose, and deliberate breach of a duty;

(b) in the context of search warrants, it involves an intentional or deliberate disregard of the rights of affected persons or the duties of the police to the judicial officer;

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[10] Referring to *Van Essen* v *The Attorney-General of New Zealand* [2013] NZHC 917 at [76]–[77].

(c) the assessment requires consideration of the totality of the circumstances and has an objective and subjective component; and

(d) bad faith can be contrasted with a breach of standards or expectations or non-compliance with policy, norms, or guidelines, which may lack the requisite obliquity to qualify as bad faith.

[30] Dealing with the first key plank of Mr de Boer's bad faith claim, Mr Minchin contends that having refused discovery of documents, the Judge should have inferred that the warrant was sought by PNHQ from the available information, including the following:

(a) the forwarding of the email to PNHQ for their consideration;

(b) the absence of explanation as to why the investigation was commenced immediately after the amnesty period expired;

(c) no explanation could be offered by the officers for the redaction of the informer's email,

(d) Mr de Boer was a vocal critic of the proposed amendments to the Arms Act;

(e) the police engaged with members of the public over the changes to the Arms Act, but not Mr de Boer; and

(f) the search of Mr de Boer's home was the first one conducted after the amnesty period.

[31] But none of these matters, individually or collectively, provide a sufficient basis for a finding that the PNHQ issued a direction, let alone targeted Mr de Boer. It is speculative to suggest that PNHQ directed that Mr de Boer's residence be searched. It is not enough to point to the absence of an explanation for the application and the redactions. Importantly, as Ms Lawson noted in submissions, had there been any written directive from PNHQ relevant to discover, they would have discovered it.

The fact that the officers could not recall exactly who asked for the redactions to be made, does not then support an inference of bad faith engagement by PNHQ. Their explanation that it may have been someone more senior in the police adds nothing to that claim. Nor is this a case of the various threads of a circumstantial case combining to ground the claim of a bad faith directive. The threads are simply absent.

[32] Turning to the second and third key planks of the bad faith claim, it is common ground that an applicant for a search warrant must "lay before the judicial officer all facts which could reasonably be regarded as relevant" and must "not present the judicial officer with a selective or edited version of the facts".[11] In addition, as set out by the Court of Appeal in *R v Williams,* "there has to be some accompanying evidence in the application suggesting why the informant should be considered reliable and why the informant's assertions are solidly grounded in more than mere suspicion, rumour or gossip".[12]

[33] On the police evidence, the informant's email was not relied upon by itself to provide the foundation for the application. It was the trigger for the investigation that followed, and it was this investigation conducted by Constable Solomona that confirmed the existence of Mr de Boer's Facebook post showing a lever-action rifle with blue (dark colour) metal and brown wooden stock. It was not necessary therefore to provide further information about the informant or the text of the informant's email because the key allegation made in the informant's email was independently verified.

[34] However, this account is contested by Mr Minchin as he says there was no direct evidence produced confirming that fact that Constable Solomona had independently verified the Facebook post of the rifle. While Constable Dunn refers to Constable Solomona's investigation, he says that is hearsay evidence and inadmissible. On that basis, there was no evidence before Judge Sinclair to find that the police had independently verified the existence of the post. On this reasoning, the text of the informer's email should have been provided to the judicial officer.

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11 *R v McColl* (1999) 17 CRNZ 136 at [20] (CA). See also *Hager v Attorney General* [2015] NZHC 3268, [2016] 2 NZLR 523 at [62]–[64].

12 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [216].

[35] But I note two important points. This issue was not raised until the hearing so the police did not produce evidence from Constable Solomona in respect of it. Secondly, Mr Minchin's position on verification is difficult to reconcile with Mr de Boer's pleadings wherein he admits being in possession of the gun in issue in April 2019, and Mr de Boer neither pleads nor avers that the screenshot of the Facebook post referred to in the application is fabricated. I therefore consider the hearsay objection to be without merit. There can be no serious issue with the reliability of Constable Dunn's statements as to steps taken to verify the Facebook post. Moreover, on the issue of bad faith, it cannot be seriously suggested that Constable Dunn had not proceeded on the basis that the Facebook post had in fact been verified by Constable Solomona. Accordingly, I see nothing in the verification point and I am satisfied that it was not necessary to produce the text of the informer's email.

[36] As to the request for anonymity, Mr Minchin's complaint is difficult to follow. The informer clearly stated that they wanted to make an anonymous tip-off and an informer enjoys privilege under s 64 of the Evidence Act. In addition, the suggestion that the anonymity was to hide the informer's hostile animus adds little to the bad faith claim because the focus is not the informer's attitude, but that of the police and evidence adduced by the police as to their attitude.

[37] There is a related complaint that the screenshot taken from the informer's email and attached to the application was misleading because it did not include the comment linking the Select Committee process. This is said to be important because it coloured the entirety of the post to signify that Mr de Boer was engaged in political free speech, rather than promoting or foreshadowing unlawful possession of a weapon. As I have already noted, this has implications in terms of the reasonableness and legality of the warrant to which I will return to below, but there is nothing before me to suggest that the police intentionally omitted this part of the Facebook page.

[38] Accordingly, I see no reason for disturbing the findings of the District Court on the issue of bad faith.

Reasonableness

[39] In relation to the warrant application, Mr Minchin contends that:

(a) The Judge erred in not finding that the police should have included in the search warrant application mention that the firearm at issue could have been easily modified and rendered legal.

(b) The Judge erred in discounting the informer's email as being irrelevant to the decision to conduct the search.

(c) The Judge erred by relying on the evidence of Detective Constable Dunn about the relevance of potential gun modification.

(d) The Judge erred by not considering expert evidence that the firearm was very common and easily able to be modified and rendered legal.

(e) The Judge erred in not finding that the police misled the Court by providing only part of the Facebook post.

(f) The police presented no explanation as to why the police commenced the investigation and searched the home having forwarded the issue on to PNHQ for consideration.

(g) The Judge failed to address an issue as to who had redacted the informer's email, suggesting illegal senior police involvement in the application.

(h) The police did not have a proper basis for the application, given:

(i) the time elapsed for believing Mr de Boer still had the gun at the time of the application and there was an insufficient basis to impute illegality to him;

(ii) there was no proper basis to suggest that Mr de Boer would not comply with the law, other than his political expression.

[40] Ms Lawson, in short, supports the findings of the District Court on these matters.

Analysis

[41] Section 6 of the Search and Surveillance Act 2012 provides the threshold test for a search warrant. It states:

> **6 Issuing officer may issue search warrant**
>
> (1) An issuing officer may issue a search warrant, in relation to a place, vehicle, or other thing, on application by a constable if the issuing officer is satisfied that there are reasonable grounds—
>
> (a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and
>
> (b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing specified in the application.
>
> (2) This section does not apply to an application for a search warrant issued under section 18D.

[42] Any application for a search warrant must contain sufficient information to enable the judicial officer to be satisfied that the threshold criteria can be met.[13]

[43] I agree with the Judge that there is sufficient information to justify the following findings:

(a) Mr de Boer was the owner of the firearm of the same or similar description identified in the Facebook post;

(b) Mr de Boer held very strong views about the correctness of owning and possessing such a firearm; and

(c) there was no record of Mr de Boer handing in the firearm to police during the amnesty period.

[44] While I accept that there was a significant delay between the publication of the post (April 2019) and the application for the warrant (January 2020), that Mr de Boer

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[13] Mathew Downs (ed) *Adams on Criminal Law - Rights and* Powers (online ed, Thomson Reuters) at [SS98.01].

had a blemish free record, and that modifying the rifle to make it lawful was a relatively simple matter, but for what I will say about the omission, I accept it was still available to the judicial officer to find that there was a reasonable suspicion Mr de Boer retained possession of the rifle and for a reasonable belief that it might be found at his residential address.

[45] I also agree there was no need to include the informant's email or identity. This would have added nothing to the legitimate weight of the post itself. Indeed, to do so may have been unfairly prejudicial to Mr de Boer insofar as it presented a negative view of him. While information about the capacity to modify the rifle provided a fuller picture of the likelihood that Mr de Boer retained the rifle unlawfully, ultimately the police and the judicial officer could only speculate as to the likelihood of that modification having occurred.

The omission

[46] However, the omission to include the Facebook post comment linking the Parliament Select Committee submission page in the Facebook post was significant in my view. The reference to the parliamentary process provides important context to the picture of the rifle. The post was clearly a form of political speech designed to encourage participation in the democratic process. It was not simply a statement of disgruntlement as suggested by the police in the application. And while some of the information attached to the application show that Mr de Boer is politically active, that would appear to have been offered up to support the emphasis in the application that he was "right wing", and on the reasoning deployed in the application, that he was therefore more likely to retain the rifle. By contrast, what the reference to the link showed is that Mr de Boer was promoting active participation in the law-making process, rather than encouraging dissent from it. To my mind, it would have brought important context and balance to the application and to the interpretation of the post, and thus the evaluation that the judicial officer had to make.

[47] The residual issue therefore is whether the omission was such that the warrant must be invalidated. Ms Lawson submits that this brings into focus s 379 of the Criminal Procedure Act 2011, which states:

> **379 Proceedings not to be questioned for want of form**
>
> No charging document, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding may be dismissed, set aside, or held invalid by any court by reason only of any defect, irregularity, omission, or want of form unless the court is satisfied that there has been a miscarriage of justice.

[48] Ms Lawson also highlighted the following passage from the judgment of the majority in Supreme Court in *Dotcom v Attorney-General* wherein it identified the correct approach to the previous but equivalent provision noting:[14]

> [129] In summary, the authorities to date have held that full effect should be given to the ordinary and natural meaning of the language of s 204. The authorities accept that some defects are so serious that the document or process concerned must be treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach. The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204. Where a court concludes that the relevant document or process is not a nullity on account of the particular defect(s), the question whether s 204's protective effect is available depends on whether that will involve a miscarriage of justice. That will be determined by whether or not the particular defect has caused significant prejudice to the person affected. In considering whether there is such prejudice, where defects on the face of a search warrant are alleged, the court is entitled to have regard to the context or surrounding circumstances to see whether they alleviate the potential effect of any such deficiencies or whether prejudice remains.

[49] I was sufficiently troubled by all of this to invite further submissions on the significance of the failure to refer to relevant material and the relevance if any of the fact that the subject matter concerns the exercise of political free speech.

[50] Mr Minchin made the following additional submissions:

(a) Political free speech is at the core of the common law search and seizure law, referring to the "great cases" of *Entick v Carrington* and *Wilkes v Wood,* that revolved around John Wilkes MP's sustained condemnation of corruption with the English Parliament and the publication of various articles by him under various pseudonyms at a time it was illegal to report on Parliament's proceedings.[15]

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14 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

15 *Entick v Carrington* (1765) 19 State Tr 1029, 95 ER 807 (KB); and *Wilkes v Wood* (1763) Lofft 1, 98 ER 489.

(b) Free speech and freedom of the press are central to the public interest in the functioning of a free and democratic society.[16]

(c) Omission of relevant material is an abuse of process,[17] and all of the circumstances must be considered in exercising the discretion to issue a warrant.[18]

(d) A US First and Fourth Amendment case dealing with qualified immunity for officers identifies a fair warning test to the effect that the contours of the right must be sufficient clear that a reasonable official would understand that what he is doing violates that right.[19]

(e) US warrant authority suggests that if intentional or conscious indifference is at play, the warrant should be invalidated and applications must take care to state explicitly when drawing conclusions rather than reciting facts.[20]

(f) The reference to membership of "Right Minds" and the post indicate a high level of dissatisfaction with the Arms Act amendment.

(g) In the present matter, the application, with its focus on membership of Right Minds and the suggestion that the post indicated a high level of dissatisfaction with the Arms Act amendment, tilted the judicial officer toward a "true threat" while omitting to provide context, which was lawful political engagement by way of Select Committee submission.

(h) It is only through the doctrine of the fruit of the poisonous tree that wrongful police action can be constrained.

[51] Ms Lawson could not identify any authorities directly on point, and instead provided examples of the court invalidating search warrants or production orders due

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16 *Bonnard v Perryman* (1891) 2 Ch 269 at 284.
17 *Hager v Attorney-General,* above n 13.
18 *R v National Post* 2010 SCC 16, [2010] 1 SCR 477.
19 *Bailey v Iles* 87 F 4th 275 (5th Cir, 2023).
20 *People v Caffot* (1980) Cr 19815.

to failure to refer to relevant material. She submits that these cases show that the threshold is high.[21] She accepts that a failure to alert an issuing officer to the exercise of political free speech could invalidate a search warrant. However, this would depend on the facts of the case. This requires an assessment of the relevance of the information to the test being applied (in this case s 6) and the impact this information might have on the issuing officer's decision making. It is not accepted, however, that a statement made in the context of political free speech could not be used to support a search warrant. Although, the usual threshold test would still apply, including the duty of candour and good faith requirements.

[52] Turning to the merits, Ms Lawson submits that :

(a) The police were not aware of the omission so there was no breach of the duty of candour.

(b) Even if the police officers were aware of it, the comment was not so relevant that the failure to mention it in the application nullifies the warrant or creates a miscarriage of justice. The fact that Mr de Boer encouraged others to submit on the Bill does not add anything further given the Facebook post itself makes it clear he was engaging in political free speech, and other Facebook entries attached to the application show he was a right-wing political commentator. The police also made clear that this alone did not support a suspicion of offending.

(c) It is likely a judicial officer would have issued the warrant even had this information been included given the balance of the information provided.

[53] The points made by Ms Lawson are acknowledged but I have come to the view that the omission of the comment linking the Select Committee process has caused

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[21] *R v McColl* (1999) 17 CRNZ 136 (CA); *Hager v Attorney-General,* above n 13; *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505; *Mawhinney v Auckland Council* [2019] NZCA 313; and *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108.

significant prejudice to Mr de Boer. I am satisfied that a judicial officer, fully informed about the content of the post and the significance of the right of political free speech, probably would have either declined the application or sought further information about Mr de Boer's background, that might better show that he is a person of real concern and that might further support an inference he was still in possession of the firearm.

[54] I am fortified in this view for the following reasons. The application for the warrant was not strong on its face. The information supporting an inference of possession of the rifle was several months old at the time of the application and there was no further information supplied by the police, other than his political and social ideology, to suggest that Mr de Boer presented a real risk of possessing a rifle unlawfully. He had no prior convictions for such behaviour and there was nothing in the posts produced that signalled by inference, or otherwise, an intention to retain the rifle. In addition, there was nothing before the Judge to support an inference that Mr de Boer presented any sort of risk of wrongdoing whatsoever, other than his "right wing" posts. But taken at face value, these "right wing" posts do not support an inference that Mr de Boer presents any sort of risk to the community. The posts include "Group Rules" that stipulate, among other things, that "thou shalt not race-bait", "thou shalt be civil" and "thou shalt not break the law of the land".

[55] It is in this context that the significance of the link to the Select Committee process stands out for consideration. How likely is it that a person with no criminal background whatsoever, no history of violence to others of any form, and no online history of supporting violence or illegality, and who otherwise actively promotes compliance with the law and lawful participation in the democratic process, will then act unlawfully. To my mind, it is speculative to assume that such a person, like Mr de Boer, would, having so publicly promoted compliance with the law, exercised his right of political free speech to criticise the Bill, and encouraged the use of the democratic process to achieve his goals, would then act unlawfully by retaining the rifle.

[56] I am not naïve to the harm caused by groups to vulnerable minorities prone to vilification because of their race, religion, ethnicity, or sexual orientation. The horrific

episode of violence underpinning the Bill is and always will be a reason for caution. But in a system governed by the rule of law, and a commitment to fundamental rights and freedoms, the power to search must be clearly justified. As the majority in *Dotcom* observed:[22]

> [71] Under s 21 of the New Zealand Bill of Rights Act 1990, everyone in New Zealand has the right not to be subjected to unreasonable search or seizure. This statutory prohibition has its origins in the common law, in particular the great English case of *Entick v Carrington* and also reflects New Zealand's international obligations.

[57] And as the Supreme Court in *Boyd v United States* so eloquently put it:[23]

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick v Carrington*].

[58] In this case, it was not enough to identify the so-called "right wing" speech as a reason for a search warrant per se. The police expressly disavowed such a proposition in the application, but at the same time state that when this "right wing" background is observed in the "context" of Mr de Boer's post, it does indicate a high level of dissatisfaction with the amendment of the Arms Act and that this level of dissatisfaction could possibly result in an intent to keep the prohibited firearms/magazine. I am prepared to accept this logic based on the post as presented to the judicial officer. But the fragility of this reasoning is exposed when the full post, with the comment linking the Select Committee process, is examined. The post moves from a pure statement of disgruntlement that might support the inference sought by the police, to a clear form of political speech directed to participation in the democratic process. The omission therefore means that the process has gone wrong. Mr de Boer has been significantly prejudiced insofar as he has been portrayed as simply a disgruntled "right wing" advocate at risk of criminal wrongdoing. Objectively assessed, the much stronger inference is that he was simply exercising his right of political free speech and this needed to be carefully weighed in the assessment.

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22 *Dotcom v Attorney-General,* above n 17 (footnotes omitted).
23 *Boyd v United States* 116 US 616 (1886) at 630.

[59] I accept that there may be cases where the content of alleged political free speech may, by itself, be such as to justify a suspicion of criminal wrongdoing. Nothing in this decision should be seen to hold otherwise. But the facts of this case are somewhat unique, involving a post directed to participation in the legislative process and no other evidence to suggest Mr de Boer presented any risk of criminal wrongdoing. Therefore, the suspicion that Mr de Boer was at risk of illegally retaining the rifle was not clearly justified on the then available information.

[60] Accordingly, I find that the process for obtaining the warrant was flawed and that there has been a miscarriage of justice. I will address the remedy below, but first I turn to the claim that the search was unreasonable and unlawful.

The search

[61] I now briefly address the claims in relation to the search.

[62] Mr Minchin claims that the search was unreasonable because:

(a) the search was conducted by armed police, despite the police being of the view that the appellant would be compliant;

(b) the search was of a family home;

(c) Mr de Boer's wife was unwell, and absurdly required to get out of bed to search for the rifle;

(d) the search extended to the adjoining home of Mr de Boer's parents, without any supporting evidence it would be there; and

(e) the search involved a large number of police.

[63] I agree with Ms Lawson's basic submissions on this complaint. The use of the Armed Response Team and armed police was justified given the level of uncertainty involved when searching for a firearm. Mr de Boer's anticipated compliance does not obviate the need for a cautious approach. Similarly, the fact that a family home or the

adjoining parents' home was searched does not mean that a different approach is warranted. The assessment of the risk associated with the search, and the scope of it, were properly matters for the police to assess. There was also evidence that the search was conducted in a relatively low-key manner, and care was taken not to scare the occupants. I also consider that the extent and scope of the search, including of the bed of the wife, is an operational matter for the police. Moreover, nothing before me suggests that conduct of the search was disproportionate to the goal of locating the firearm. It occurred over a relatively short period (1 hour and 24 minutes) involving only four to six officers for the majority of the time. Nor is there any evidence to support an inference that the search was conducted unreasonably.

[64] Given this, I reject the claim that the search itself was unreasonable.

Remedy

[65] Compensation was sought in the pleadings for trespass, breach of NZBORA and abuse of process. This narrowed to a claim for NZBORA damages before me. In addition, Mr Minchin indicated during the hearing that Mr de Boer seeks a declaration of invalidity and NZBORA breach as the primary remedy, rather than compensation. I consider this to be the proper outcome. I can state my reasons briefly. First, there was no bad faith. This is a case of unintentional omission rather than an intentional breach of the duty of candour. Second, I am mindful that the search involved an unlawful intrusion into Mr de Boer's family home and of the harm that follows from this. But it was done for a proper purpose, that is to secure what the police believed to be an unlawfully possessed firearm. Third, the Court of Appeal in *The Attorney-General v Van Essen* identified a high threshold for public law damages, saying:[24]

> … the question of remedy first requires consideration of the non-monetary relief that can be or has been given. The Court will assess whether that is enough to redress the breach and any relevant injury. Only if the breach in question requires something more to vindicate it will an award of damages be considered necessary.

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[24] *The Attorney-General v Van Essen* [2015] NZCA 22 at [82].

[66] Here, I consider a declaration of invalidity and breach of s 21 of NZBORA to be sufficient vindication. As I have said, the process miscarried due to inadvertence.

Outcome

[67] I find that the warrant process miscarried for failure to include a full copy of Mr de Boer's post, and in particular that part of it providing a link to the Select Committee process. Given the emphasis placed on Mr de Boer's participation in a "right wing" group by the police, the failure to refer to this link meant that the judicial officer was left with an unfair impression of Mr de Boer, one that might support an inference that he would unlawfully retain possession of the rifle shown in the post. But the reference to the links supports an altogether and more cogent inference, namely that Mr de Boer was seeking engagement in the democratic process. Given this, the application was flawed and I consider that a Judge properly appraised of the facts would likely decline the application — there being no information that Mr De Boer provided any sort of risk of illegal possession of a firearm — or request further information that might support an inference that he might present such a risk.

[68] In the result, the appeal is allowed. I make a declaration to the effect that the warrant was invalid and that the subsequent search breached Mr de Boer's right to be free from unreasonable search.

[69] I invite submissions on costs. My present view is that Mr de Boer should have his reasonable costs in this court and in the District Court.

Whata J