Supreme Court
New South Wales

Medium Neutral Citation:	**Holdsworth v Commissioner of Police, New South Wales Police Force [2020] NSWSC 228**
Hearing dates:	11 February 2020
Date of orders:	13 March 2020
Decision date:	13 March 2020
Jurisdiction:	Common Law - Administrative Law
Before:	Beech-Jones J
Decision:	(1) The amended summons is dismissed. (2) The Plaintiff pay the Defendant's costs.
Catchwords:	STATUTORY INTERPRETATION – declaratory relief – whether firearms prohibition order made under the Firearms and Dangerous Weapons Act 1973 constitutes a firearms prohibition order for the purposes of Part 7 of the Firearms Act 1996 – savings and transitional provisions – ordinary meaning manifestly absurd or unreasonable – extrinsic materials – purposive construction of Firearms Act 1996 – HELD: firearms prohibition order made under the Firearms and Dangerous Weapons Act 1973 is a firearms prohibition order for the purposes of Part 7 of the Firearms Act 1996 – amended summons dismissed
Legislation Cited:	Firearms Act 1946 Firearms Act 1989 Firearms Act 1996 Firearms and Criminal Groups Legislation Amendment Act 2013 Firearms and Dangerous Weapons Act 1973 Interpretation Act 1987 Uniform Civil Procedure Rules 2005, r 36.16(3A)
Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41 Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981]

	HCA 26 Ellison and Another v Sandini Pty Ltd and Others (2018) 263 FCR 460; [2018] FCAFC 44 Jenks v Dickinson [1997] STC 853 Muller v Dalgety & Co Ltd (1909) 9 CLR 693; [1909] HCA 67 Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue (NSW) (2014) 99 ATR 748; [2014] NSWSC 1501 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193; [2005] HCA 58 Wellington Capital Ltd v ASIC (2014) 254 CLR 288; [2014] HCA 43
Texts Cited:	New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 25 June 1996 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 1 December 1998
Category:	Principal judgment
Parties:	Craig Holdsworth (Plaintiff) Commissioner of Police, NSW Police Force (Defendant)
Representation:	Counsel: S Free SC; N Simpson (Plaintiff) C Mantziaris (Defendant) Solicitors: Nelson Keane & Hemmingway Lawyers (Plaintiff) Crown Solicitor's Office (Defendant)
File Number(s):	2019/242840

JUDGMENT

1 By an Amended Summons filed on 27 September 2019, the plaintiff, Craig Holdsworth seeks declaratory relief to the effect that a firearms prohibition order made against him on 5 February 1986 under the ***Firearms and Dangerous Weapons Act 1973*** (the "1973 Act") does not constitute a firearms prohibition order for the purposes of Part 7 of the ***Firearms Act 1996*** (the "1996 Act")***.*** Mr Holdsworth contends that the effect of the transitional provisions to the legislation that replaced the ***1973 Act*** from time to time were not such as to preserve its operation. In summary, while I accept that the text of the transitional provisions to the ***1996 Act*** and the ***Firearms Act 1989*** (the "1989 Act") provide support for Mr Holdsworth's argument, I am satisfied that, on its proper construction, the ***1996 Act*** does not have that effect. Accordingly, his amended summons will be dismissed.

The Firearms Prohibition Order and the 1973 Act.

2 The ***1973 Act*** came into force on 1 August 1975. It repealed and replaced various pieces of legislation dealing with firearms, principally the ***Firearms Act 1946*** (***1973 Act***, Schedule 1).

3 Part V of the ***1973 Act*** made provision for firearms prohibition orders. Section 69 provided:

> "(1) The Commissioner [of Police] may make an order in respect of any person who, in the opinion of the Commissioner, is not fit in the public interest, to be permitted to have a firearm, not being a pistol or a blank fire pistol, in his possession.
>
> (2) An order made under subsection (1) shall take effect upon its being served personally on the person in respect of whom it is made."

4 Section 70 made it an offence for a person "in respect of whom a firearms prohibition order [was] in force" to possess, sell or transfer a firearm "not being a pistol or a blank fire pistol".

5 Section 24(1)(k) and 24(2) of the ***1973 Act*** conferred a right of appeal to a stipendiary magistrate on an person if "a firearms prohibition order is made in respect of him".

6 A firearms prohibition order was made against the plaintiff on 5 February 1986 by the Commissioner of Police (the "1986 Order") under s 69(1) of the ***1973 Act***. The 1986 Order was served on the plaintiff on 15 March 1986. The reason why the order was made was not the subject of evidence and is irrelevant to these proceedings.

7 As at February and March 1986, s 69 of the ***1973 Act*** was not relevantly different to s 69 in its original form, save that the reference to a "pistol or a blank fire pistol" was changed to a "blank fire firearm". Further, s 24 had been amended so that an appeal was to be heard by a court of petty sessions held before a stipendiary magistrate (s 24(2)). In addition, a right of appeal was conferred on a person in respect of whom a firearms prohibition order had been in force for not less than five years and who had requested the Commissioner to revoke the order but he or she refused to do so (s 24(1)(l) and s 24(1A)).

The 1989 Act

8 The ***1973 Act*** was repealed with effect from 1 July 1990 upon the commencement of the ***1989 Act***.

9 There was no statement of principles or legislative objects in the ***1989 Act***. To the extent that it may be relevant, the second reading speech is suggestive of the legislation being a compromise version of an earlier bill produced by a previous government (New South Wales Legislative Assembly, ***Parliamentary Debates*** (Hansard), 1 December 1998 at 4176). The relevant Minister referred to a process of consultation with affected groups and stated that the "primary aim of this legislation is to enhance the control of firearms in the community through the introduction of legislation which is tough yet workable" (id).

10

Section 39 of the ***1989 Act*** provided for the making of firearms prohibition orders as follows:

> "39 Firearms prohibition orders
>
> (1) The Commissioner of Police may make an order prohibiting from having possession of or using firearms any person who (in the opinion of the Commissioner) is not fit, in the public interest, to be permitted to have possession of a firearm.
>
> (2) Without limiting the generality of subsection (1), such an order may be made in respect of any person who had possession of or used a firearm immediately before its being seized under this or any other Act.
>
> (3) A firearms prohibition order takes effect when it is served personally on the person to whom it is directed."

11 Section 40(1) of the ***1989 Act*** provided that it was an offence for a person to possess or use a firearm in "contravention of a firearms prohibition order that is in force". "Firearms prohibition order" was defined in s 3(1) of the ***1989 Act*** to mean "an order in force under section 39".

12 Section 41 of the ***1989 Act*** conferred a right to appeal to the Local Court constituted by a Magistrate sitting alone against, relevantly, "a firearms prohibition order made against the person" (s 41(1)(d)). Section 41(2) provided that such appeals must be made within such "periods as are fixed by the regulations". There was no equivalent provision to former s 24(1)(l) of the ***1973 Act*** noted above.

13 Schedule 1 to the ***1989 Act*** contained savings and transitional provisions dealing with, relevantly, the status of firearms prohibition orders made under the ***1973 Act***. Clause 2 of Schedule 1 provided:

> **"Saving of current firearms prohibition orders**
>
> 2 A firearms prohibition order—
>
> (a) that was made under section 69(1) of the former Act; and
>
> (b) that was in force immediately before that provision was repealed by this Act,
>
> shall be treated as a firearms prohibition order under this Act."

14 The "former Act" was defined to mean the ***1973 Act*** (Schedule 1, clause 1).

15 It was not in dispute that clause 2 of Schedule 1 had the effect that a firearms prohibition order that was in force under the ***1973 Act*** at the time of its repeal engaged the prohibition in s 40 of the ***1989 Act***. As I will explain, there is a debate as to whether the effect of clause 2 was operative to deem such an order as an order made under s 39.

The 1996 Act

16 The ***1989 Act*** was repealed on 1 July 1997, when the ***Firearms Act 1996*** (the "1996 Act") commenced. The ***1996 Act*** remains in force.

17 In contrast to the ***1989 Act***, s 3 of the ***1996 Act*** contained an emphatic statement of "principles and objects". Section 3(1) stated that the "underlying principles" of the Act included "confirm[ing that] firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety" and the need "to improve

public safety:… by [inter alia] imposing strict controls on the possession and use of firearms". Section 3(2) specified that the objects of the Act included "requir[ing] each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm" and "to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms". None of the principles or objects acknowledged the countervailing interests of firearm holders or owners save that s 3(2)(f) referred "to provid[ing] … compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms".

18 Part 7 of the ***1996 Act*** dealt with firearms prohibition orders. Section 4(1) defined "a firearms prohibition order" to mean an "order in force under section 73". From the time of its enactment until 1 November 2013, s 73(1) of the ***1996 Act*** conferred on the Commissioner of Police a power to "make an order prohibiting a person from having possession of or using any firearm" if in the opinion of the Commissioner that was in the public interest. Section 73(3) provided that a firearms prohibition order takes effect when a police officer serves a copy of the order personally on the person against whom it is made.

19 When it was enacted, s 74(1) of the ***1996 Act*** provided that "[a] person must not possess or use a firearm in contravention of a firearms prohibition order that is in force" and s 74(3) provided that a person must not sell or give possession of a firearm to another person whom they know is prohibited from possessing firearms by a firearms prohibition order.

20 When it was enacted, s 75(1)(f) of the ***1996 Act*** conferred a right of appeal to the Local Court constituted by a Magistrate sitting alone against relevantly, a firearms prohibition order made against the person. Since the enactment of the ***1996 Act***, s 75 has been amended such that the power to conduct reviews is conferred on the Civil and Administrative Tribunal.

21 Schedule 3 to the ***1996 Act*** contains savings and transitional provisions. At all relevant times clause 11 of Schedule 3 provided:

> "**Savings of current firearms prohibition orders**
>
> A firearms prohibition order that was ***made under section 39 of the former Act***, and in force immediately before the repeal of that section by this Act, is taken to be a firearms prohibition order under this Act." (emphasis added)

22 The reference to the "former Act" is to the ***1989 Act*** (***1996 Act***, Schedule 3 clause 2).

23 Substantial amendments to s 73 and following were made with effect from 1 November 2013 by the ***Firearms and Criminal Groups Legislation Amendment Act 2013***. Former s 73(3) became s 73(2) and instead s 73(3) conferred an express power on the Commissioner to revoke a firearms prohibition order at any time for any or no stated reason (Schedule 1, clause 39). Section 74 was amended to add prohibitions on persons who are "subject to a firearms prohibition order" (eg, current s 74(2), (3) and (4)) or by reference to whether a person is "subject to a firearms prohibition order" (eg

s 74(5)). Further, s 74A was inserted into the ***1996 Act***. It conferred special powers on police officers in respect of persons who are "subject to a firearms prohibition order" including a power to detain such a person (s 74(2)(a)) or enter a premise or vehicle occupied, controlled or managed by them and conduct a search for any firearms, firearms parts or ammunition.

24 The explanatory note to the Firearms Bill 1996 that became the ***1996 Act*** states that the legislation gave effect to the resolutions of the Australasian Police Ministers' Council for 10 May 1996 concerning firearms prohibition, regulation and control. Those meetings were convened in the wake of the shooting at Port Arthur in April 1996. In the second reading speech for the Firearms Bill 1996 the then Attorney-General stated that New South Wales was the "first State to implement comprehensive, tough new gun laws under [then Prime Minister Howard's] plan" (New South Wales Legislative Assembly, ***Parliamentary Debates*** (Hansard), 25 June 1996 at 3557). The speech referred to a spate of shootings culminating in those at Port Arthur and emphasised the "strict controls" being placed on firearms (id). In relation to Part 7 of the Firearms Bill concerning firearm prohibition orders, the Attorney-General stated that "[p]art 7 simply continues the existing regime of firearms prohibition orders". The speech did not address the effect of the transitional provisions (New South Wales Legislative Assembly, ***Parliamentary Debates*** (Hansard), 25 June 1996 at 3562).

The Plaintiff's Case

25 It follows from the above that the 1986 Order can only continue to have effect if, for the purposes of clause 11 of the Schedule 3 to the ***1996 Act*** it is "a firearms prohibition order that was made under section 39" of the ***1989 Act*** and was in force immediately before the repeal of s 39.

26 The plaintiff accepted that clause 2 of Schedule 1 to the ***1989 Act*** operated to "treat" the 1986 Order as "a firearms prohibition order" under the ***1989 Act***. However, the plaintiff contended that the 1986 Order was not, for the purposes of clause 11 of Schedule 3 to the ***1996 Act***, a firearms prohibition order that was "made under" s 39 of the ***1989 Act***. He contended that it was not the product of an exercise of the Commissioner's power under s 39 as the conferral of that power post-dates the 1986 Order.

27 The plaintiff further contended that there was nothing in the ***1996 Act*** that had the effect of deeming the 1986 Order to be an order that was made under s 39 of the ***1989 Act*** and clause 2 of Schedule 1 to the ***1989 Act*** did not have that effect either. In particular, the plaintiff contended that clause 2 of Schedule 1 to the ***1989 Act*** did not provide that an order made under the ***1973 Act***, such as the 1986 Order, was also deemed to be taken as a firearms prohibition order made under s 39 of the ***1989 Act***. The plaintiff made four further points in support of that contention.

28 First, he contended that clause 2 of Schedule 1 of the ***1989 Act*** does not contain any words to that effect.

29 Second, he contended that, if clause 2 of Schedule 1 of the ***1989 Act*** was to be interpreted in that manner, then all orders under the ***1973 Act*** would have had to have been served personally in order for them to come into force under s 39(2) of the ***1989 Act***.

30 Third, it was submitted that if orders under the ***1973 Act***, like the 1986 Order, were deemed to have been made under s 39 of the ***1989 Act*** then persons, subject to orders under the ***1973 Act***, would have acquired a fresh right of appeal under s 42 of the ***1989 Act***.

31 Fourth, the plaintiff pointed to the fact that in other savings and transitional provisions in the ***1989 Act***, the legislature expressly chose to use the device of deeming that certain steps were to be taken to "have been made" under particular provisions but did not do so with clause 2 of Schedule 1. For example, clause 6 of Schedule 1 to the ***1989 Act*** provided that certain pending applications under repealed provisions of the ***1973 Act*** or regulations shall be "treated as having been made" under the corresponding provisions of the new Act or regulations.

Defendant's Contention

32 The defendant submitted that the plaintiff's contention construes the deeming aspect of the transitional provisions in both the ***1989 Act*** and the ***1996 Act*** too narrowly. It noted that both sets of provisions were entitled "Savings of current firearms prohibitions orders". In relation to the ***1989 Act*** it was in effect submitted that the combination of clause 2 of Schedule 1 and the definition of "firearms prohibition order" meant that to "treat" an order under the ***1986 Act*** as a "firearms prohibition order" under the ***1989 Act*** is to deem it to satisfy the definition of a "firearms prohibition order" in s 3, namely, that is an "order in force under" s 39. It was submitted that to construe the transitional provisions of the ***1996 Act*** as not preserving the operation of the firearms prohibition orders made under the ***1973 Act*** would be contrary to the purpose of the ***1996 Act***.

Further Submissions

33 Both the plaintiff's submissions in reply and the oral submissions made on his behalf by Mr Free SC focused on the precise words of clause 11 of Schedule 3 of the ***1996 Act*** . In particular it was submitted that clause 11 identified the two limbs of s 39 of the ***1989 Act***, namely, the making of an order under the section and it coming into force by reason of it being served. It was submitted that, if it had intended to continue the operation of all orders made under the ***1973 Act*** that were in force immediately prior to the repeal of the ***1989 Act*** then it was unnecessary to refer to only such orders as were made under s 39.

Interpretative Principles

34

In ***Muller v Dalgety & Co Ltd*** (1909) 9 CLR 693 at 696; [1909] HCA 67, Griffith CJ observed that the word "deemed … is … commonly used for the purpose of creating ... a 'statutory fiction'… that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate" and with such terms "it becomes very important to consider the purpose for which the statutory fiction is introduced". To similar effect in ***Wellington Capital Ltd v ASIC*** (2014) 254 CLR 288; [2014] HCA 43 at [51], Gageler J observed that such "legal fiction[s]" are "not construed to have a legal operation beyond that required to achieve the object of its incorporation".

35 Otherwise, the ordinary principles of statutory interpretation apply to the construction of deeming provisions (***Newcastle Airport Pty Ltd v Chief Commissioner of State Revenue (NSW)*** (2014) 99 ATR 748; [2014] NSWSC 1501 at [55] ("Newcastle Airport"); ***Ellison and Another v Sandini Pty Ltd and Others*** (2018) 263 FCR 460; [2018] FCAFC 44 at [210]). Those principles include ss 33 and 34 of the ***Interpretation Act 1987***. Section 33 obliges the court to prefer a construction that would promote the purpose or object underlying the Act as opposed to a construction that would not promote that purpose or object. Further, s 34(1) enables recourse to be had to the extrinsic materials to either confirm the ordinary meaning conveyed by the text of the provision or to:

> "(b) … determine the meaning of the provision:
>
> (i) if the provision is ambiguous or obscure, or
>
> (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is ***manifestly absurd or is unreasonable***." (emphasis added)

36 In ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*** (2009) 239 CLR 27; [2009] HCA 41 at [47] ("Alcan"), Hayne, Heydon, Crennan and Kiefel JJ stated:

> "(1) This Court has stated on many occasions that the task of statutory construction must ***begin with*** a consideration of the text itself ... (2) Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text ... (3) The language which has actually been employed in the text of legislation is the surest guide to legislative intention … (4) The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision …, in particular the mischief … it is seeking to remedy." (emphasis and numbering added)

37 Four points should be noted about this statement.

38 First, immediately before this statement in ***Alcan***, the plurality noted (at [45]) that ***Alcan*** was not a case where either of the suggested constructions would "lead to an absurd result of the kind referred to in ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*** (1981) 147 CLR 297; [1981] HCA 26" ("Cooper Brookes"). In ***Cooper Brookes*** at 304, Gibbs CJ noted that "[i]t is only by considering the meaning of the words used by the legislature that the court can ascertain its intention", but that meant reading the relevant section "as part of the whole instrument". His Honour added that "the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of

construction are not so rigid as to prevent a realistic solution in such a case". To that end, s 34(1)(b) of the ***Interpretation Act*** allows recourse to the secondary materials to determine the meaning of the provision in those circumstances.

39 Second, to the extent that this passage from ***Alcan*** refers to the "text itself" that is a reference to the whole of the text of the statute including any statement of statutory objects and purposes. One of the authorities cited in support of proposition (4) in the above passage from ***Alcan*** is the following statement from ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 381; [1998] HCA 28 [69] per McHugh, Gummow, Kirby and Hayne JJ:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute…. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole' citing Cooper Brookes at 320 per Mason and Willson JJ. In ***Commissioner for Railways (NSW) v Agalianos*** [(1995) 92 CLR 390 at 397], Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.' Thus, the process of construction must always begin by examining the context of the provision that is being construed ….

40 Third, one of the authorities cited in support of the first proposition stated in the above passage from ***Alcan*** is ***Stevens v Kabushiki Kaisha Sony Computer Entertainment*** (2005) 224 CLR 193 at 206; [2005] HCA 58 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ ("Stevens"), where their Honours observed that a resort to "purposive construction" did not "obviate the need for close attention to the text and structure" of the relevant division of the ***Copyright Act 1968*** (Cth). In ***Stevens***, the relevant statement of legislative objects did not address the operation of the division in question (at [32]) and the extrinsic material only indicated that the legislation reflected a compromise such that to fix upon one relevant "purpose" out of many carried with it a "risk of unintended consequences" (at [34]). That is not this case. The legislative statement of principles and objects in s 4 of the ***1996 Act*** has been described above. There is no element of compromise in that statement.

41 Fourth, otherwise in considering the above passage from ***Alcan*** it must be remembered that, of necessity, a deeming provision often involves "artificial assumptions" such that "[i]t will frequently be difficult or unrealistic to expect the legislature to be able satisfactorily to [prescribe] the precise limit to the circumstances in which, or the extent to which, the artificial assumptions are to be made" (***Jenks v Dickinson*** [1997] STC 853 at 878 per Neuberger J cited in ***Newcastle Airport*** at [56] per White J).

Clause 11 of Schedule 3 to the 1996 Act

42 Although much of the focus of the argument concerned the extent of the deeming given effect to by clause 2 of Schedule 1 of the ***1989 Act***, the critical issue for these proceedings is the operation of clause 11 of Schedule 3 to the ***1996 Act***. It is only that provision which is now capable of giving any legal force to the ***1986 Act***.

43

As noted in ***Alcan***, the task must begin with a consideration of the text itself. Clause 11 of Schedule 3 effects a deeming upon firearms prohibition orders that were made under s 39(1) of the ***1989 Act*** and were still in force immediately prior to its repeal. On its face the clause does not refer to such orders that were either deemed to be made under the ***1989 Act*** or merely given force under the ***1989 Act***, assuming that there is a difference between the two. The schedule does not expressly refer to the ***1973 Act*** save possibly for the heading to clause 11 which refers to "current firearms prohibitions orders". An order made under the ***1973 Act*** which is still in force by reason of the ***1989 Act*** is clearly current. Nevertheless, a consideration of just the text of clause 11 suggests that the more preferable "ordinary meaning" of the provision is that it is not apt to continue to orders made under the ***1973 Act***. However, consistent with the above analysis and ss 33 and 34 of the ***Interpretation Act***, it is appropriate to consider clause 11 in the context of the ***1996 Act*** as a whole, especially having regard to the Act's purpose and objects and, to the extent necessary, the secondary materials.

44 A consideration of the entire text of the ***1996 Act***, including the statement of principles and objects of the Act, confirms what is otherwise suggested by the secondary materials and the context in which the legislation was enacted, namely, that the legislation was intended to impose the "strict controls" the Attorney-General referred to and to continue the "existing regime of firearms prohibition orders". In relation to the latter, this continuation involved the adoption of the same definitions and mechanisms for making and reviewing firearm prohibition orders, as well as a transitional provision that was expressed in similar terms to the ***1989 Act*** save that the ***1989 Act*** used the phrase "treated as" whereas the ***1996 Act*** used the phrase "is taken to be".

45 It follows that it would be inconsistent with this statutory scheme for the ***1996 Act*** to render firearms prohibitions orders made under the ***1973 Act*** to be no longer enforceable. Such a result would be anything but a continuation of the "existing regime of firearms prohibition orders". That result would be incongruous and indeed absurd given the context in which the ***1996 Act*** was enacted and the statement of objects and principles in s 4. There is nothing in the context of the enactment of the ***1996 Act***, the explanatory materials or the terms of the Act to suggest that those amendments arose from any perceived unfairness to persons being subject to firearms prohibition orders for a sustained period which might warrant treating firearms prohibitions orders made under the ***1973 Act*** that were continued in force by the ***1989 Act*** as having lapsed.

46 Given that clause 11 of Schedule 3 of the ***1996 Act*** is a deeming provision whose operation is not clear, these matters warrant a wide view being taken of both the scope of the deeming clause (ie the words "made under section 39" etc) and the extent of the deeming given effect to. Clause 11 of Schedule 3 operates upon a repealed Act that defined a firearms prohibition order as being an order "in force under section 39" (s 3) and provided for the making of an order under s 39(1) and the order then coming into force under s 39(3) upon it being served. Clause 11 of Schedule 3 also operated upon an Act that itself included a deeming provision in clause 2 of Schedule 1 that treated

firearms prohibitions order made under the ***1973 Act*** as "a firearms prohibition order under the ***1989 Act***". In turn that meant that to satisfy the definition of firearms prohibition order in s 3(1) and engage the prohibitions in s 40 it had to be treated as being "in force under section 39" of the ***1989 Act***.

47 Whether a deeming provision such as clause 2 of Schedule 1 of the ***1989 Act*** should be interpreted as deeming a firearms prohibition order made under the ***1973 Act*** as having been made under s 39 depends on the context of the inquiry. The relevant context to address that issue for this case is the 1996 Act. In the context of the ***1996 Act***, where a wide view of the scope of clause 11 of Schedule 3 and the extent of the deeming it gives effect is required, then that supports a construction that the reference to "made under section 39 of the former Act" extends to such orders that satisfied or had previously been deemed to satisfy the definition of "firearm prohibitions order" in s 3(1) of the ***1989 Act*** and which were still in force at the time of the repeal. That approach to clause 11 of Schedule 3 respects the context in which the ***1996 Act*** was enacted and gives effect to the objects and purpose of the legislation whereas the plaintiff's construction does not. The end result is that the reference to "made under section 39" in clause 11 of Schedule 3 of the ***1996 Act*** includes a reference to orders deemed to be made under s 39 of the ***1989 Act*** and that the clause otherwise treats or assumes that the ***1989 Act*** deemed orders made under the ***1973 Act*** as having been "made" under the ***1989 Act***.

48 Further, even if it was concluded that the ordinary meaning of clause 11 of Schedule 3 of the ***1996 Act,*** bearing in mind the context and the purpose of the Act, was that orders made under the ***1973 Act*** lapsed on the enactment of the ***1996 Act*** then such a result would be "manifestly absurd or is unreasonable" (***Interpretation Act***, s 34(1)(b)(ii)) such that "a realistic solution" of the kind contemplated by Gibbs CJ in ***Cooper Brookes*** could be found. No possible consideration of the statutory purpose or objects of the ***1996 Act*** and the secondary materials could lead to a conclusion that it was intended that such orders would lapse. Instead, those matters point to clause 11 of Schedule 3 providing for a continuation of "the existing regime of firearms prohibition orders" and "strict controls" and not some form of amnesty being proffered to persons subject to firearms prohibition order made as early as seven years previously (s 34(1)(3)(ii)).

49 Two further matters should be noted.

50 First, as noted in the written submissions in reply and in his oral submissions, Mr Free made the powerful point that, if orders made under the ***1973 Act*** which continued in force under the ***1989 Act*** were in turn continued in force under the ***1996 Act*** by clause 11 of Schedule 3, then the first "limb" of clause 11 which refers to orders being made under s 39 etc would be otiose. He submitted that the same result could have been achieved by simply deeming orders that were in force under the ***1989 Act*** immediately prior to its repeal, including orders made under the ***1973 Act***, to be taken to be orders under the ***1996 Act***. Counsel for the defendant, Mr Mantziaris contended that the two limbs were included to accommodate the possibility that an order might

have been made prior to the repeal but not yet served so it had not come into "force". Mr Free countered that that submission only reinforced how the interpretation urged by the defendant could have been achieved by simply continuing the operation of all such orders as were in force.

51 It can be readily accepted that superior wording to clause 11 can be conceived of to achieve either of the interpretations contended for. Moreover, divorced from a consideration of the context, purpose and history of the ***1996 Act***, Mr Free's point is a strong factor in favour of the interpretation he contends for. However, when those matters are considered it reveals that clause 11 of Schedule 3 is simply operating upon the definition of a firearms prohibition order in the ***1989 Act***, namely, an order in force under s 39 and addressing both aspects of s 39, ie, the making of an order and its service. The real question is whether in doing so there is the relevant intention to exclude orders that are deemed or taken to have been in force under s 39 and, in turn, taken to have been made under s 39? In light of the context, purpose and history of the ***1996 Act*** the answer is "no". As noted, the contrary conclusion would be "manifestly absurd and unreasonable".

52 Second, as noted, Mr Free made a number of points concerning the consequences for the ***1989 Act*** if the effect of clause 2 of Schedule 1 was that an order made under the ***1973 Act*** was to be treated as an order made under s 39 of the ***1989 Act***. It follows from the above that the relevant inquiry is whether the ***1996 Act*** treats as an order made under the ***1973 Act*** as an order that was made under s 39 the ***1989 Act*** rather than whether the ***1989 Act*** necessarily had that effect. While the wording of clause 2 of Schedule 1 of the ***1989 Act*** and the clause 11 of Schedule 3 to the ***1996 Act*** are similar that does not necessarily mean that both provisions must be interpreted in the same way given the difference in context, purpose and objects of the ***1989 Act*** and the ***1996 Act***. As stated, to construe clause 11 of Schedule 3 to the ***1996 Act*** as not continuing orders made under the ***1973 Act*** is an absurd outcome. By contrast, with clause 2 of Schedule 1 to the ***1989 Act***, no question arises as to the status of orders made prior to the enactment of the ***1973 Act*** as there were none.

Conclusion

53 It follows that the plaintiff's amended summons must be dismissed. I will order the plaintiff to pay the defendant's costs. If either party seeks a variation on that costs order they should apply within the 14-day time period referred to in Uniform Civil Procedure Rules 2005, r 36.16(3A).

54 Accordingly, the Court orders:

(1) The amended summons is dismissed.

(2) The Plaintiff pay the Defendant's costs.

****

Decision last updated: 13 March 2020