IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA261/2019
[2020] NZCA 80

BETWEEN	THE KIWI PARTY INCORPORATED Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing: 3 March 2020 and further submissions on 13 and 20 March 2020

Court: Collins, Simon France and Lang JJ

Counsel: G E Minchin for Appellant
G M Taylor for Respondent

Judgment: 24 March 2020 at 12 noon

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent is entitled to costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 15 March 2019, a gunman entered the Al Noor Mosque and soon thereafter the Linwood Islamic Centre in Christchurch. He was armed with a number of weapons, including two semi-automatic rifles. Fifty-one people died as a result of being shot by the gunman, 40 other victims were wounded. The gunman is awaiting

trial in relation to 51 charges of murder, 40 charges of attempted murder and one charge of engaging in a terrorist act.

[2] Immediately after the shootings the Prime Minister announced that New Zealand gun laws would change. This was achieved through two measures:

(a) The Arms (Military Style Semi-automatic Firearms) Order 2019 (the Order), which was passed by the Executive on 21 March 2019 pursuant to s 74A(c) of the Arms Act 1983 (the Act) and remained in place for 21 days.

(b) The Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 (the Amendment Act) which took effect from 12 April 2019.

[3] In addition to revoking the Order, the Amendment Act imposed restrictions on licensed arms dealers, amended the endorsement provisions under the Act and made it an offence to sell, supply or possess any prohibited firearms, magazines or gun parts, including semi-automatic firearms. The Amendment Act put in place a Government buy-back arrangement for the prohibited firearms, magazines and gun parts.

[4] The legislature's response to the events of 15 March 2019 was not, however, universally approved. The Kiwi Party was formed by a group of licensed firearms holders with the aim of challenging the lawfulness of the Order and Amendment Act.

Statement of claim

[5] Twelve causes of action are pleaded in the statement of claim filed in the High Court by the Kiwi Party. Those causes of action seek declarations and orders for, amongst other pronouncements, that the Amendment Act has "no force of law until validated by a subsequent general election or by referendum".

[6] The causes of action allege that:

(a) The Order was ultra vires.[1]

(b) The members of the Finance and Expenditure Committee (Select Committee) which considered the Bill that became the Amendment Act made material errors of fact;[2] failed to adequately consult and consider submissions on the Bill;[3] predetermined the outcome of its processes;[4] "failed in their duty to provide the checks and balances necessary to maintain a free and democratic society";[5] took into account irrelevant considerations;[6] failed to take into account a mandatory relevant consideration, namely art 61 of Magna Carta;[7] and "abdicated from its responsibility by endorsing *de facto* legislative powers to repeal legislation upon the Executive".[8]

(c) The Amendment Act breaches the Treaty of Waitangi[9], rights to private property,[10] the Bill of Rights 1688;[11] and is "unconstitutional" because it contravenes the "right to bear arms [which] is coincident with the balance of powers in English society".[12]

High Court judgment

[7] The Attorney-General applied to the High Court to strike out all causes of action. Wylie J was satisfied the criteria for strike-out were met in relation to the second to twelfth causes of action. He did not, however, strike out the first cause of action.

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1 First cause of action.
2 Second cause of action.
3 Third cause of action.
4 Fourth cause of action.
5 Fifth cause of action.
6 Sixth cause of action.
7 Seventh cause of action.
8 Eighth cause of action.
9 Ninth cause of action.
10 Tenth cause of action.
11 Eleventh cause of action.
12 Twelfth cause of action.

[8] The second to eighth causes of action were struck out on the basis that it would be a breach of parliamentary privilege to inquire into the Select Committee's processes and decisions.[13] The High Court Judge was also satisfied that the ninth to twelfth causes of action needed to be struck out because:

(a) There was no jurisdiction to make a declaration that the Amendment Act breaches the Treaty of Waitangi.

(b) The Courts do not have the power to consider the validity of properly enacted laws or the contents of legislation.

(c) Whilst there may be a common law limitation on parliamentary powers, the complaints pursued by the Kiwi Party did not engage that jurisdiction.

[9] The Kiwi Party now appeals the High Court's decision striking out 11 of its causes of action. Initially, the Crown cross-appealed the High Court's decision not to strike out the first cause of action but it later abandoned its cross-appeal, thus the ability of the Kiwi Party to pursue the first cause of action is not an issue in this appeal.

Grounds of appeal

[10] The submissions advanced in support of the appeal drew upon a variety of aspects of the constitutional and political history of England, the United States and New Zealand and comprised a potpourri of constitutional and jurisprudential concepts. At times the submissions advanced in support of the appeal were mercurial and difficult to discern. We have, however, endeavoured to distil the submissions into the following propositions:

(a) New Zealand citizens have a constitutional right to bear arms.

(b) The processes and decisions of the Select Committee were unlawful.

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13 *Kiwi Party Inc v Attorney-General* [2019] NZHC 1163 at [30].

(c) The Amendment Act was unlawful.

(d) The Amendment Act was introduced and passed through Parliament through the exercise of prerogative powers by the Crown and is therefore amenable to review by the High Court.

(e) Section 3 of the Declaratory Judgments Act 1908 permits the Kiwi Party to seek a declaration that the Amendment Act is invalid and that it also breaches Magna Carta, the Bill of Rights 1688 and the Treaty of Waitangi.

Strike-out principles

[11] Before addressing the grounds of appeal that we have been able to identify, we shall briefly summarise the well-established principles that govern strike-out applications.

[12] Those principles are encapsulated in the following five points:[14]

(a) Facts that are pleaded are presumed to be correct unless they are patently and demonstrably without foundation.

(b) Before striking out a pleading the Court must be satisfied it is clearly untenable.

(c) The strike-out jurisdiction is to be exercised sparingly and only in clear cases.

(d) The strike-out jurisdiction may be exercised in cases which engage difficult questions of law.

(e) The Courts will be hesitant to strike out a plea that relates to a developing area of the law.

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[14] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

Does New Zealand recognise a constitutional right to bear arms?

[13] Underpinning almost all aspects of the Kiwi Party's case is the claim that New Zealand citizens have a constitutional right to bear arms and in particular, weapons, magazines and gun parts that have been prohibited by the Amendment Act.

[14] This so-called constitutional right is said to be derived from ancient custom, which evolved into a common law right and was affirmed by Magna Carta, the Bill of Rights 1688 and the Treaty of Waitangi. In his supplementary submissions filed on 20 March Mr Minchin, counsel for the Kiwi Party, maintained 'the right to bear arms is the practical application of the legal principles that 'no power is unfettered' and is the mark of a free society".

[15] Mr Minchin, submitted that New Zealanders need to be able to exercise their "constitutional right" to access semi-automatic weapons and large capacity magazines in order to be able to effectively defend themselves against any unlawful use of arms by agents of the Crown or Executive. In particular, he argued that New Zealanders need access to semi-automatic weapons in order to match police fire power should the police resort to unlawful use of firearms against New Zealand citizens. Mr Minchin acknowledged the "ugliness" of the proposition he was advancing.

[16] We accept for present purposes that it was customary in ancient times for citizens of England to bear arms. Support for this understanding of the history of bearing arms in England can be found in *District of Columbia v Heller*.[15] We do not need, however, to determine if the custom of bearing arms evolved into a common law right.

[17] An examination of the constitutional instruments relied upon by Mr Minchin quickly exposes the fallacy of his argument that New Zealanders have a constitutional right to bear arms.

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15 *District of Columbia v Heller* 554 US 570 (2008) at 592–594.

[18] Mr Minchin argued that arts 29 and 61 of Magna Carta lay the foundation for the argument that New Zealand citizens have a constitutional right to bear arms. Article 29 of Magna Carta, which forms part of the laws of New Zealand provides:[16]

> No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.

This clause is the seed from which the rule of law has grown. It does not, however, provide any basis for an argument that the citizens of New Zealand have a constitutional right to bear arms.

[19] Article 61 of Magna Carta is also of no assistance to the Kiwi Party. Article 61 is not part of the laws of New Zealand. In any event, that article, sometimes referred to as the "security clause", set out a process for addressing breaches of authority and abuse of power by the Crown. It did not bestow any authority on citizens to bear arms.

[20] Next, Mr Minchin relied on the Bill of Rights 1688. There are two relevant clauses, both of which became incorporated in the Bill of Rights Act 1689:

(a) "… the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law".

(b) "That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law".

[21] What is clear is that, at least since the passing of the Bill of Rights Act 1689, the possession of arms in England is regulated by law and that Parliament's powers to legislate are extremely wide. Sir William Blackstone said even if Parliament passed a statute that was unreasonable there was "no power" that could "control it" and that any attempt to "set the judicial power above that of the legislature, … would be subversive of all government".[17]

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16 See Magna Carta (1297) 25 Edw 1 c 29 (footnote omitted): in force in New Zealand pursuant to Imperial Laws Application Act 1988, sch 1.

17 William Blackstone *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University Chicago Press, Chicago, 1979) vol 1 at 91.

[22] Since the time of the Glorious Revolution, Parliament has reigned supreme in England's constitutional arrangements. These arrangements were transplanted to New Zealand in 1852 with the passing of the New Zealand Constitution Act 1852 (UK) and the evolution of New Zealand's brand of a Westminster Parliament. As a consequence, in New Zealand, as in the United Kingdom:[18]

> Parliament's legislation is the highest source of law … the Glorious Revolution swept aside any limitation on parliamentary power. Parliament could legislate on any topic affecting Sovereign or subject; there were no fundamental laws; and any law could be amended or repealed by ordinary legislation.

[23] Mr Minchin also relied upon art 3 of the Treaty of Waitangi under which the Crown gave an assurance to Māori that they would have the Crown's protection and be afforded all rights accorded to British subjects. It was argued by Mr Minchin that as British subjects had the right to bear arms, Māori also acquired that right and that the Amendment Act therefore breached art 3 of the Treaty of Waitangi.

[24] The obvious lacuna in this aspect of the case advanced for the Kiwi Party is that it assumes British subjects had an unbridled right to bear arms. As we have already noted, there was no such right. Any ability for a citizen to bear arms has, at least since 1689, been able to be regulated by laws passed by Parliament.

[25] The fallacy that there is a constitutional right to bear arms in New Zealand is further highlighted by an examination of the way other democratic countries regulate the ability of their citizens to access firearms. We need cite only the following examples:

(a) The United Kingdom has strict legislative controls over the access by citizens to firearms. Those restrictions can be found in the Firearms Act 1968 (UK), and amendments made to that Act in 1988 and 1997. The 1997 amendments were made after the Dunblane school massacre in 1996.[19] As a consequence, with limited exceptions, citizens of the

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18 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [15.4].

19 Lord Cullen *The Public Inquiry into the shootings at Dunblane Primary School on 13 March 1996* (CM 3386, 1996).

United Kingdom are prohibited from possessing semi-automatic rifles and pistols.

(b) Australia's guns laws were amended following the mass shooting at Port Arthur in 1996. The ownership, possession and use of firearms in Australia is regulated by State and Territory legislation that were aligned through the National Firearms Agreement in 1996. As a consequence, citizens in Australia have limited ability to own, possess and use a wide variety of firearms.[20] Ordinary citizens do not have access to semi-automatic rifles that fire more than ten rounds and pump-action or self-loading shotguns with a magazine capacity of more than five rounds.

(c) Canada, which has a carefully prescribed system for licensing arms users and the registration of firearms has prohibited most citizens from accessing many forms of military-style assault rifles. Those prohibitions were achieved through amendments to the Canadian Criminal Code starting in 1969 and through the Firearms Act 1995.

[26] It is striking that the so-called right to bear arms is not referred to in any international human rights instrument, such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights. Of the 190 countries that have a written constitution, only the constitutions of Guatemala, Mexico and the United States refer to a right to bear arms.[21] The relevant parts of the constitutions of Guatemala and Mexico are modelled on the Second Amendment of the United States Constitution but expressly provide for limits according to law. Thus, it can be fairly said that the right to bear arms is an example of American constitutional exceptionalism. Even in the United States, the ability of a citizen to possess and use firearms may be subject to legislative control. Thus, assault weapons have been banned by seven State legislatures, including those in California and New York.[22]

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20 Australian Police Ministers' Council Special Firearms Meeting (Canberra, 10 May 1996).

21 Constitution of the Republic of Guatemala, art 38; Constitution of Mexico, art 10; and United States Constitution, amend II.

22 For California see Roberti-Roos Assault Weapons Control Act 1989 and California Penal Code, §§ 12276.1 and 30515. For New York see New York Penal Law, § 400.

[27] Our examination of the arguments advanced by Mr Minchin leads to the following conclusions:

(a) The so-called right to bear arms is not supported by any constitutional instruments that apply in New Zealand.

(b) In this country, as in almost all countries, a citizen's ability to possess, own and use firearms is regulated by legislation.

(c) There are only three countries which have some form of constitutional right to bear arms.

(d) There is no constitutional right to bear arms in New Zealand let alone the arms that are prohibited by the Amendment Act.

Challenges to Select Committee's processes and decisions

[28] In its second to eighth causes of action, the Kiwi Party challenges the lawfulness of the processes and decisions made by the Select Committee. These challenges are in the context of the Bill having been introduced into Parliament on 1 April 2019 with the first reading being completed on 2 April 2019. The Bill was then referred to the Select Committee, which reported back to Parliament on 8 April 2019. The second reading of the Bill took place on 9 April 2019. The third reading was on 10 April 2019 and the Governor-General's assent was given on 11 April 2019. Thus, the parliamentary process that resulted in the Amendment Act took 11 days.

[29] We will briefly summarise the specific complaints against the Select Committee's processes and decisions set out in the statement of claim.

Second cause of action

[30] The Kiwi Party says that on 3 April 2019 the Chairman of the Select Committee made a statement to the effect that the vast majority of licensed firearm holders would not be affected by the proposed legislative amendment. The Kiwi Party pleads that this was wrong and that in fact 30 to 35 per cent of licensed firearm holders in

New Zealand are affected by the Amendment Act. The prayer for relief in relation to the second cause of action seeks a declaration that the Chairman of the Select Committee "made a mistake of fact and that the legislative process … miscarried".

Third cause of action

[31] The Kiwi Party pleads that the Select Committee's consultation process was unreasonably truncated and that as a consequence "the checks and balances necessary in a free and democratic society have not been properly engaged and the determination of the Select Committee was unlawful".

Fourth cause of action

[32] In its fourth cause of action the Kiwi Party pleads that on 3 April 2019, the Chairman of the Select Committee said that "the public of New Zealand has demanded Parliament take action on [the] issue" of regulating access to firearms. The Kiwi Party alleges that the Chairman's comments show he had "predetermined the decision of the Select Committee" and that as a consequence the proceedings of the Select Committee were conducted unlawfully.

Fifth cause of action

[33] The Kiwi Party pleads that "[t]he Select Committee process was a sham as party leadership had determined that the Bill should be approved by the Select Committee and this indicated to the members of the Select Committee that if they disobeyed party leadership their parliamentary careers would be over". Amongst the orders sought by the Kiwi Party in relation to the fifth cause of action is a declaration that "the Select Committee failed in their duty to provide the checks and balances necessary to maintain a free and democratic society".

Sixth cause of action

[34] The sixth cause of action alleges the Government took into account "the UN Arms Trade Treaty" and the "UN policy of general civil disarmament". It is pleaded that the Arms Treaty was not part of the law of New Zealand and could not lawfully have been taken into account by the Select Committee.

Seventh cause of action

[35] The seventh cause of action pleads that the Select Committee was required to take art 61 of Magna Carta into account and that its failure to do so was unlawful.

Eighth cause of action

[36] The last challenge to the Select Committee's processes and decisions alleges that the Select Committee endorsed the promulgation of the Order, which the Kiwi Party says was ultra vires of the Arms Act. It has pleaded this aspect of the Select Committee's conduct involved it abdicating "its responsibility, by endorsing *de facto* legislative powers to repeal legislation upon the Executive".

Parliamentary Privilege Act 2014

[37] The Parliamentary Privilege Act was prompted by concerns about aspects of the Supreme Court's judgment in *Attorney-General v Leigh*.[23] In particular, it was thought the Supreme Court's decision unduly restricted parliamentary privilege. The legislature responded by passing the Parliamentary Privilege Act "to restore" the scope of parliamentary privilege and to align the law of parliamentary privilege in New Zealand with comparable commonwealth jurisdictions.[24]

[38] One of the principles that underpin the Parliamentary Privilege Act can be traced to art 9 of the Bill of Rights 1688, which states:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament

[39] In *Prebble v Television New Zealand Ltd*, the Privy Council recognised that art 9 of the Bill of Rights prevented courts from questioning parliamentary proceedings and intruding into Parliament's exclusive domain.[25] The Privy Council, however, also recognised parliamentary privilege is wider than the primary focus of

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23 *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713.

24 Parliamentary Privilege Bill 2013 (179-1) (explanatory note); and Philip Joseph "Parliamentary privilege developments in New Zealand: The Good, the Bad and the Ugly" (2015) 30 Australasian Parliamentary Review 115 at 128.

25 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

art 9 of the Bill of Rights, which aims to protect freedom of speech in Parliament. Lord Browne-Wilkinson explained:[26]

> In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges…

[40] Section 4(1)(b) of the Parliamentary Privilege Act encapsulates the wider principle articulated by Lord Browne-Wilkinson by directing the courts to interpret the Parliamentary Privilege Act in a way that:

> promotes the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges…

[41] Section 8(3) of the Parliamentary Privilege Act requires all courts and persons acting judicially to take judicial notice of the privileges, immunities and powers exercisable by the House of Representatives, its committees and its members.

[42] Section 10 of the Parliamentary Privilege Act removes any doubt about the scope of the term "parliamentary proceedings". Section 10(1) provides:

> **Proceedings in Parliament**, for the purposes of Article 9 of the Bill of Rights 1688, and for the purposes of this Act, means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee.

[43] Section 11 defines what is meant by "questioning" proceedings in Parliament contrary to art 9 of the Bill of Rights. Section 11 provides:

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:

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[26] At 7.

(b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:

(d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:

(e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[44] The statements attributed to the Chairman of the Select Committee that form the basis of the second and fourth causes of action were not made during the deliberations of the Select Committee, but in a media interview. Nevertheless, those causes of action, as with the other causes of action, question the processes and decisions of the Select Committee. In particular, the second to eighth causes of action all invite the High Court to either:

(a) question the truth, motives, intentions and good faith of the Select Committee; or

(b) question the proceedings of the Select Committee for the purposes of seeking an order, remedy or relief in the form of a declaration that challenges the legitimacy of the proceedings and decisions made by the Select Committee.

[45] These attempts to question the procedures and decisions of the Select Committee breach s 11 of the Parliamentary Privilege Act and are therefore untenable.

The challenge to the lawfulness of the Amendment Act

[46] In its ninth to twelfth causes of action the Kiwi Party seeks declarations that call into question the lawfulness of the Amendment Act.

Ninth cause of action

[47] The ninth cause of action seeks a declaration that the Amendment Act breaches the Treaty of Waitangi. This aspect of the case for the Kiwi Party changed between the High Court and this Court. When this cause of action was explained in the High Court it was claimed that the Treaty of Waitangi preserved taonga for Māori and that the Amendment Act removed a taonga when it prohibited the ownership, possession and use of the weapons, magazines and gun parts caught by the Amendment Act. In this Court, the arguments about alleged inconsistencies between the Amendment Act and the Treaty of Waitangi were confined to art 3 of the Treaty.

[48] Wylie J reasoned:[27]

> There is no jurisdiction to make a declaration that the Amendment Act is in breach of the Treaty of Waitangi. The pleading assumes that the Treaty of Waitangi creates legal rights which can be breached. The Treaty of Waitangi, although of "transcendent importance", does not on its own confer enforceable legal rights. There has to be legislative incorporation of the Treaty to establish an actionable right.

[49] The High Court Judge's conclusion was based on authorities dating back to *Te Heuheu Tukino v Aotea District Maori Land Board* and the more recent decision of the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General*.[28]

[50] The jurisdiction of the High Court to declare legislation inconsistent with the New Zealand Bill of Rights Act 1990 has only recently been recognised.[29] In an appropriate case it may be possible to argue that there is a similar jurisdiction to that recognised in *Taylor* for the courts to declare legislation inconsistent with the Treaty of Waitangi. That is an issue of major constitutional significance for New Zealand. If it arises, it will require careful analysis and an assessment of the implications of, amongst other provisions, the power of the Waitangi Tribunal to consider proposed legislation.[30]

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27 *Kiwi Party Inc v Attorney-General*, above n 13, at [34] (footnotes omitted).

28 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC); and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [36]–[48].

29 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

30 Treaty of Waitangi Act 1975, ss 6 and 8.

[51] In the present case, however, the High Court was correct to strike out the ninth cause of action because there is no tenable factual or legal basis upon which it can be said that the Amendment Act breaches the Treaty of Waitangi. The rights that the Kiwi Party say have been breached by the Amendment Act are not to be found in the Treaty of Waitangi and therefore the ninth cause of action was doomed to fail.

Tenth cause of action

[52] The tenth cause of action claims that there is a constitutional right to private property and that the Amendment Act unlawfully prohibits ownership of and confiscates private property.

[53] We briefly repeat that Parliament is able to pass whatever legislation it considers appropriate to control the possession, ownership and use of firearms in New Zealand. There is no "property right" that overrides the supremacy of Parliament. Accordingly, there is no tenable basis upon which the tenth cause of action can be seriously argued. The tenth cause of action was therefore properly struck out.

Eleventh cause of action

[54] The eleventh cause of action claims that the Amendment Act breaches the provisions of the Bill of Rights 1688 that we have set out at [20].

[55] For the reasons we have already explained, there is no tenable basis upon which the High Court could issue a declaration that the Amendment Act breaches the Bill of Rights 1688. The High Court therefore acted appropriately when it struck out the eleventh cause of action.

Twelfth cause of action

[56] The twelfth cause of action seeks a declaration that the Amendment Act contravenes the so-called constitutional right to bear arms. We have already explained the reasons why this cause of action is untenable. That cause of action also needed to be struck out.

Prerogative power or proceedings of Parliament?

[57] Mr Minchin attempted to avoid the bar on questioning parliamentary proceedings by arguing that since the Crown determined how the legislative process would proceed in relation to the Amendment Act, the Kiwi Party's proceeding involved a challenge to the exercise of a prerogative power. He endeavoured to draw support from the recent decision of the United Kingdom Supreme Court in *R (Miller) v Prime Minister* where the Court found that it was able to exercise supervision over the decision to prorogue Parliament as it was a decision of the Crown imposed on Parliament.[31]

[58] There was, however, no prerogative power engaged in the processes followed and decisions made when Parliament passed the Amendment Act. A minister's decision to introduce a Bill to Parliament and the way the House of Representatives decides to proceed with that Bill are proceedings of Parliament and therefore attract parliamentary privilege that shields Parliament's decisions from the scrutiny of the courts.

[59] Nothing pleaded by the Kiwi Party engages the prerogative powers.

Scope of declaratory relief

[60] The Kiwi Party's statement of claim seeks declaratory orders pursuant to s 3 of the Declaratory Judgments Act 1908.

[61] Section 3 of the Declaratory Judgments Act provides:

> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the … validity of any statute, …; or
>
> Where any person claims to have acquired any right under any such statute, … or to be in any other manner interested in the … validity thereof,—
>
> such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute … or of any part thereof.

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31 *R (Miller) v Prime Minister* [2019] UKSC 41, [2019] 3 WLR 589.

[62] It was argued by Mr Minchin that the words "validity of any statute" in s 3 of the Declaratory Judgments Act confer jurisdiction upon the High Court to declare statutes invalid.

[63] Consistent with the supremacy of Parliament, it is "the accepted doctrine … that the courts cannot declare an Act of Parliament to be invalid. Nor will the courts grant declarations in relation to matters that fall within the absolute and exclusive jurisdiction of Parliament …".[32]

[64] This Court has previously explained the limited scope of the powers conferred by s 3 of the Declaratory Judgments Act concerning declarations as to the "validity of any statute". In *Shaw v Commissioner of Inland Revenue*, it was stated:[33]

> The Court's power under s 3 to consider the validity of legislation is limited to ensuring that a statute was properly enacted; in other words the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created. Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements … Section 3 does not, however, give the Courts a power to consider the validity of the content of legislation.

[65] Nothing advanced by Mr Minchin undermines the "accepted doctrine" we have referred to at [63] or the interpretation of s 3 of the Declaratory Judgments Act explained by this Court in *Shaw v Commissioner of Inland Revenue*.

Conclusion

[66] The second to twelfth causes of action are untenable and cannot possibly succeed. The High Court therefore correctly struck out those causes of action.

Result

[67] The appeal is dismissed.

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[32] David Feldman (ed) *Oxford Principles of English Law: English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) at [18.27] (footnotes omitted); citing *British Railways Board* v *Pickin* [1974] AC 765 (HL) at 798; and *Bradlaugh v Gossett* (1884) 12 QBD 271.

[33] *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13]; and Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland, 2017) at 9.

[68] The respondent is entitled to costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent