BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 117

IN THE MATTER	of the Resource Management Act 1991
AND	of applications for interim and final enforcement orders under sections 316 and 320 of the Act
BETWEEN	JEAN-MARIE SABATIER AND IAN FRANCIS KNOBLOCH AS TRUSTEES OF THE SABATIER FAMILY TRUST
	(ENV-2018-AKL-0042)
	Applicant
AND	AUCKLAND COUNCIL
	First Respondent
AND	ADDISON DEVELOPMENTS LIMITED
	Second Respondent

Court:	Environment Judge J E Borthwick
In Chambers	at Christchurch
Date of Decision:	24 July 2018
Date of Issue:	24 July 2018

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: The application for costs is declined.

REASONS

Introduction

[1] This decision concerns an application for costs by Tonea Investments (NZ) Ltd and Tonea Properties (NZ) Ltd against Jean-Marie Sabatier and Ian Knobloch. A related application for costs was filed by Addison Development Ltd and is the subject matter of

a separate decision. Auckland Council does not seek costs.[1]

[2] Jean-Marie Sabatier and Ian Knobloch, as trustees of the Sabatier Family Trust, applied for interim enforcement orders against Auckland Council and Addison Developments Limited.[2]

[3] Tonea Investments (NZ) Ltd and Tonea Properties (NZ) Ltd gave notice to become a party to the proceedings pursuant to s 274 of the Resource Management Act 1991. Tonea owns land adjacent to the Sabatier and Addison Development properties and opposed the enforcement orders being made as the development of its subdivision depends on the provision of adequate stormwater infrastructure on the neighbouring properties.

[4] The orders were refused because the applicants, whom we shall refer to as Sabatier, had not established that the Environment Court has jurisdiction to make the orders. The effect of the orders would be to prohibit Auckland Council from exercising its statutory power. The power in question being the release of a certificate pursuant to s 224(c) of the Resource Management Act 1991 confirming compliance by Addison with the conditions of a subdivision consent. Sabatier, in essence, was claiming that Auckland Council would likely wrongly certify the conditions of the subdivision as having been complied with, and were it to do so this would contravene the Act.

Submissions

[5] This case is somewhat unusual in the sense that the sets of submissions make valid arguments for and against an award of costs. To a large degree, I agree with the statements made by Tonea and Sabatier and, to a lesser extent, I also agree with Addison.

Tonea application

[6] Tonea is seeking an order of costs against Sabatier, arguing in support of its application that an award of costs is just in the circumstances where (in summary):

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[1] Memorandum of counsel for Auckland Council, dated 22 June 2018.

[2] The application for interim enforcement orders was filed together with an application for substantive enforcement orders (both dated 13 March 2018). The application for substantive orders has been placed on hold pending the outcome of negotiations between the parties.

(a) a permanent stormwater solution is beyond the scope of the enforcement proceedings;

(b) Sabatier did not establish that the court has jurisdiction to make the orders sought;

(c) the orders were predicated upon there being a reviewable error by Auckland Council in the future exercise of its statutory powers and therefore the application was ill-timed;

(d) the Environment Court's decision is final in respect of the Interim Orders;[3]

(e) the prospect of Sabatier continuing with the substantive interim orders[4] is irrelevant to the determination that the court does not have jurisdiction to prohibit Auckland Council from lawfully exercising its statutory powers;

(f) Tonea's preparation was complicated and the hearing lengthened as a result of the manner in which the exhibits, many of which were of limited or no relevance, were compiled.

[7] Citing *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 in support of a submission that "costs above the "normal" range" are justified, Tonea seeks a contribution of 75% of its total costs, being the sum of $20,655.98.

[8] Sabatier opposes the application for costs and says in the circumstances it would be unjust to award the same. Save to the extent that Sabatier contends (in error) that the court's decision on its jurisdiction is not final, we do not understand Sabatier to take issue with the reasons given by Tonea above (at [6]). Indeed, these are the findings made by the court in its decision.

[9] Rather, Sabatier says – in effect – that it was placed in the position of having to commence court action because Auckland Council did not consult with Sabatier over the Council's intention that Sabatier land receive stormwater discharge from Addison and Tonea developments[5] and was not afforded an opportunity to be heard in relation to the subdivision consent applications.

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[3] Sabatier reply to costs, dated 6 July 2018, at [30] states that it remains open to establish the court has jurisdiction to prohibit Auckland Council's exercise of a statutory power. The correct position is given by Tonea. The court's decision in respect of its jurisdiction is final (Tonea reply at [6]).

[4] This prospect is raised by Sabatier in its reply to costs, dated 6 July 2018, at [30].

[5] Sabatier, reply to costs, dated 6 July at [7].

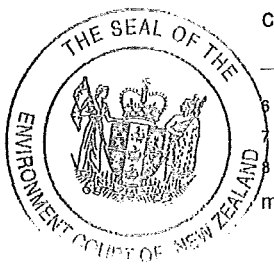
[10] Sabatier cites *Titirangi Protection Group Inc & Ors v Watercare Services Ltd* [2018] NZHC 1026 in support of a proposition that it is unjust to award costs where there has been a denial of a right to participate under the Act, when its participation would otherwise be "appropriate".[6] Sabatier explains that in lodging the interim enforcement orders it sought to halt development of the neighbouring land until such time as a permanent stormwater disposal system that accords the Council's standards.[7] Going further, Sabatier says the wider public has an interest in these proceedings as the relevant stormwater infrastructure serves the catchment.

[11] Saliently, some ten weeks has passed since the court released its decision and Auckland Council has not yet released s 224 certificates. Sabatier submits if its claims that Addison is not complying with the conditions of its subdivision consents was truly without merit, Auckland Council would have released the certificates shortly after the court's decision.

[12] Regardless of the outcome of the application for interim orders, Sabatier's concerns about the effects of stormwater discharge on the future development of its land are substantive. This is implicit from Addison's application to vary 2014 Stage 7A subdivision consent that it did not adequately address the adverse effects on Sabatier land of stormwater discharge arising from its consented/altered network. The variation responds to deficiencies in Addison's proposed stormwater management identified by Sabatier, we understand, either in the course of preparing for this proceeding or Auckland Council's application to take Sabatier land for a private drain (pursuant to s 460 Local Government Act 1974).

Addison's application

[13] Addison seeks indemnity costs of $157,114.00[8] because, it submits, Sabatier could have averted the proceeding altogether by agreeing to Auckland Council initiating the acquisition process to take its land for a public drain under s 181 of the Local Government Act. Sabatier responds saying that Auckland Council has never sought to acquire its land under the Public Works Act or Local Government Act. While the Council commenced proceedings to take its land for a public drain, it then withdrew the action



[6] Sabatier, reply to costs, dated 6 July at [9].
[7] [2018] NZEnvC 60 at [32].
[8] At the time of filing for costs it purported to claim damages of $103,876.00 but advised in a later memorandum (dated 28 June 2018) that it would not pursue damages.

and pursued instead an application for a private drain (s 460 Local Government Act). Sabatier's position at the hearing was that the latter course would disadvantage it both financially and by the absence of any right of appeal.

[14] If the court does not accept this submission, Addison argues substantial costs (at least) are justified given that Sabatier advanced arguments that were without substance; the proceedings were an abuse of the court's processes in that the objective was to place financial pressure on Addison for the Trust's benefit; Sabatier poorly pleaded and presented the case thereby unnecessarily lengthening the hearing and it also failed to properly explore the possibility of settlement where compromise was reasonably expected.

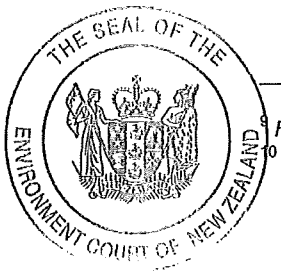
[15] Before turning to the merits of the applications I briefly traverse the law.

The law

[16] Section 285 of the Act confers a broad discretion upon the Environment Court to order costs, with the sole qualification being that the quantum be reasonable. Costs are ordered in the interests of "compensation where that is just".[9] As with the exercise of any judicial discretion, costs' applications are to be dealt with in a principled manner with no presumption that costs will follow a successful outcome. It is essential that the costs sought are in relation to the Environment Court proceeding.

[17] As for the amount or quantum of costs awarded, while the Environment Court has declined to set a scale of costs, for consent appeals (at least), costs ordered have tended to fall within three bands. Justice Heath in *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*[10] noted these bands are not dissimilar to the standard, increased and indemnity costs regime applied by the High Court. Thus:

(a) standard costs;
(b) higher than standard costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.



[9] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
[10] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.

[18] In this proceeding, both parties seek an order above the usual range of costs. Where the court has awarded higher than standard costs it is usually because there are aggravating factors present such as those identified in *DFC NZ Ltd v Bielby*[11] as follows:[12]

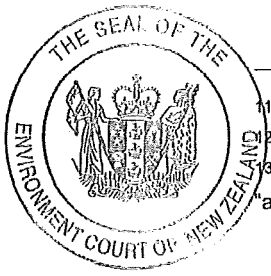
(a) whether arguments are advanced which are without substance;
(b) where the process of the court is abused;
(c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen a hearing;
(d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected; and
(e) where a party takes a technical or unmeritorious point of defense.

[19] It is worth emphasising again that "standard costs" does not infer costs will follow the event or that there is a scale of costs, if ordered. Rather, this is an observation that when made, costs have fallen within the range of a 25-33% of costs actually incurred. This range is sometimes referred to in the Environment Court's decisions as the "comfort zone".

[20] The approach I have taken on the two costs' applications is to determine:

(a) whether it is just, in all of the circumstances to exercise my discretion and order costs in favour of the parties; and if so
(b) to decide quantum.

[21] The facts of *Titirangi Protection Group Inc & Ors v Watercare Services Ltd* do not concern a case where there had been a denial of a right to participate under the Act in circumstances where participation would otherwise have been appropriate.[13] Like the Titirangi Protection Group, Sabatier wishes to be heard on resource consent applications being pursued by neighbouring landowners as it considers itself adversely affected by their proposed development. In deciding not to notify the applications, Auckland Council came to the contrary view. The Environment Court has made no findings on the notification decisions, and unless the issue arises under s 104(3) of the Act the correct



[11] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.
[12] See also Clause 6.6(d) of the Environment Court's Practice Note 2014.
[13] The word "appropriate" was used by counsel for Sabatier and I record that it is unclear what is meant by "appropriate".

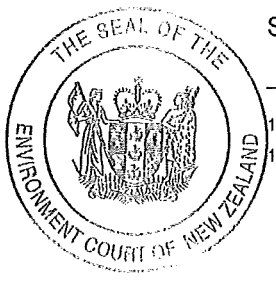
forum to challenge a notification decision is the High Court. That said, I doubt notification *per se* would have been a cure for Sabatier's concerns as it has raised broad concerns about the administration of the consents by the Council.

Whether it is just in all of the circumstances to exercise my discretion and order costs in favour of the parties

[22] Addison and Tonea do not yet have a permanent solution to the very complex issue of stormwater drainage from the Takanini South Catchment. While the matter is far from concluded it seems very likely the permanent solution will involve Sabatier's land and, if the evidence is correct, a not insignificant area of land will be required.

[23] The court held that it is arguable that the consent holder has yet to comply with the conditions of consent.[14] Addison rejects Sabatier's claim of partial success as "immaterial" to the fundamental failure to obtain orders and submits Sabatier failed to make out, prima facie, that the consents were granted in error or that Addison had not complied with the conditions of its consents. The former matter was not argued by Sabatier[15] and the latter is a subtle reframing of the decision. That said, Addison and Tonea are right – the findings of the court on compliance with the consent conditions and other matters are immaterial to whether it has jurisdiction to make the interim orders sought by Sabatier. However, it is my view that justice requires that I not set aside the wider context giving rise to this proceeding. While Sabatier did not establish the court has jurisdiction to make the interim orders it sought, I have concluded that it is just in all of the circumstances of the case not to exercise my discretion and to decline the application for costs.

[24] I am not in any position on the evidence before the court to make the finding sought by Addison that Sabatier brought these proceedings to put financial pressure on Addison and thereby abused the processes of the court. It is correct that Addison and Auckland Council, through various endeavours, sought to resolve the conflict. Addison initiated direct negotiations with Sabatier to purchase its land or to compensate for the land required for a public drain. Auckland Council commenced more coercive action under the Local Government Act to take Sabatier's land for use as a private drain. Sabatier's reply is that it has always been open to settlement but not on any terms.



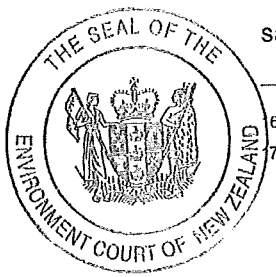
[14] [2018] NZEnvC 60 at [18].
[15] Sabatier, legal submission dated 17 March 2018, at [2-7].

[25] It is also correct that Sabatier sought disclosure from Auckland Council of the applications for consents, including variations to consents, and the decisions of Auckland Council. This document was sought over a year ago but was not disclosed until very recently.[16] Indeed, during the course of the hearing the court directed Auckland Council provide further disclosure to Sabatier, a direction which it readily complied with. No party has taken issue with Sabatier's summary of the disclosure history. I cannot discount the possibility that the failure to disclose relevant documentation impacted the conduct of the negotiations which preceded the filing of the application for interim orders. The parties have a shared interest in achieving a permanent stormwater solution, and my impression, overall, is that the process leading up to the initiation of these proceedings were not facilitative of a resolution.

[26] Tonea and Addison cite the court's criticism of the manner in which the proceedings were conducted by Sabatier – particularly in its marshalling of extensive, largely irrelevant documentary evidence. Sabatier says this was a consequence of the late disclosure, as there was very little time to filter and organise the information. This aspect of the conduct of the case is not a matter, however, which I give weight. Most if not all of the 1500 plus pages of documents, I anticipate are in the possession of the parties who, unlike the court, will be familiar with their content or at least have an understanding of the salience of the documents to the issues raised in the proceeding.

[27] I do not accept Addison's submission that it incurred "significant economic consequences"[17] when Auckland Council placed the processing of the s 224(c) certificates on hold for 56 days pending the hearing and eventual release of the court's decision. Addison does not explain how this action (considered by itself) was causative. Perhaps the delay is seen by Addison as an opportunity cost – that would be true if the delay impacted on rectification of any compliance issues with its consents. I am, of course, speculating as Addison has not conceded – and says Sabatier has not proven, that it has not complied with the conditions of its consent.

[28] Ten weeks have passed since the court released its decision but Auckland Council has not released s 224(c) certificates. At the risk of repeating myself, I am satisfied that Auckland Council is seized of the compliance issues raised by Sabatier and



[16] Sabatier legal submissions, dated 17 March 2018, at [101].
[17] Addison reply, dated 17 July 2018, at [2.2]-[2.4].

of the need to give these matters very careful consideration. Again, I do not imagine this will be a straightforward task given the land development's complex and evolving factual and legal matrices.[18]

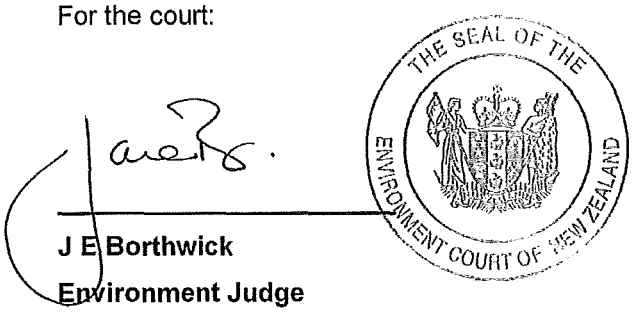
[29] That said, the complexity is not of the parties'[19] sole creation. The Takanini South Stormwater Management Plan of the Council depicts infrastructure on Sabatier land (namely a stormwater pond) integral to the implementation of that plan, but in respect of which the Council has not secured its interest over the land. This has meant Addison – in particular, has had to develop alternative, costly but ultimately only temporary, stormwater solutions.

[30] The court facilitated mediation and the decision on the interim enforcement orders appears to have had the effect of ripening the conflict for negotiation and in that regard I understand that the substantive proceeding is adjourned pending settlement discussions between Sabatier and Auckland Council over the attainment of a permanent solution. Insofar as stormwater which may be discharged over the weir at the temporary pump station is from an area wider than the Addison and Tonea development, I have no hesitation in saying there is considerable public interest in the resolution of this matter. Unless a new engineering solution presents itself, Addison cannot manage stormwater drainage within its own property as it initially conceived in the original applications for subdivision consent. As matters presently stand, the solution is one that involves Sabatier's land.

Outcome

[31] The applications for costs by Tonea and Sabatier are declined.

For the court:



J E Borthwick
Environment Judge

[18] [2018] NZEnvC 60 at [18].
[19] i.e. Addison, Tonea and Sabatier.