

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

Decision No. [2018] NZEnvC 142

IN THE MATTER of the Resource Management Act 1991
AND of an application for an enforcement
order under section 314 of the Act
BETWEEN GISBORNE DISTRICT COUNCIL
(ENV-2018-WLG-000045)
Applicant
AND DYLAN O'CONNELL
First Respondent
AND CHRISTINE ANNE DE CENT
Second Respondent

Court: Environment Judge B P Dwyer sitting alone under s 309 of the Act
Hearing: In Chambers
Date of Decision: 20 August 2018
Date of Issue: 20 August 2018

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR
ENFORCEMENT ORDER

A: Orders made
B: Costs reserved

REASONS

Introduction

[1] Gisborne District Council (the Council) has applied to the Court for enforcement orders against Dylan O'Connell and Christine Anne de Cent (jointly the



GISBORNE DISTRICT COUNCIL v D O'CONNELL & C DE CENT

Respondents) in respect of their activities on a property at 143 Seddon Street, Gisborne (the Property) and road reserve outside the Property.

[2] The orders are sought in the following terms:

1. Dylan O'Connell and Christine de Cent are required, in respect of the road reserve within 100 metres of 143 Seddon Street, Patutahi, Gisborne to:
 - (a) Remove all vehicles (including but not limited to cars, utes, trucks, motorbikes and trailers), vehicle parts (including but not limited to tyres, batteries, car bodies, car engines and axles) and any items associated with a car repair business, by 30 June 2018.
 - (b) Cease using the road reserve for the temporary or permanent storage of vehicles, vehicle parts and/or any items associated with a car repair business.
2. Dylan O'Connell and Christine de Cent are required, in respect of the property at 143 Seddon Street, Patutahi, Gisborne (Legal Identifier GS5D/1491) to:
 - (a) Remove all vehicles, vehicle parts and any items associated with a car repair business, that are visible from adjacent residential sites, visible from the road reserve at Seddon Street, Gisborne or visible from the road at Seddon Street, Gisborne by 30 June 2018.
 - (b) Cease storing vehicles, vehicle parts and/or any items associated with a car repair business outdoors where those vehicles, vehicle parts or associated items are visible from adjacent residential sites, visible from the road reserve at Seddon Street, Gisborne or visible from the road at Seddon Street, Gisborne.
3. If Dylan O'Connell and Christine de Cent (the **Respondents**) fail to comply with Orders 1(a), 1(b), 2(a) or 2(b) after 30 June 2018, the Court authorizes the Council to:
 - (a) Enter 143 Seddon Street, Patutahi, Gisborne (Legal Identifier GS5D/1491) (the **Property**) and/or the road reserve near to the Property, and remove, sell and otherwise dispose of any vehicles, vehicle parts or items that contravene Orders 1(a), 1(b), 2(a) or 2(b);
 - (b) After allowing for any moneys received from such sale or disposal, if any, recover the actual and reasonable costs and expenses arising from action taken under Order 3(a) as a debt due from the Respondents; and
 - (c) Issue invoices to the Respondents for the actual and reasonable costs and expenses incurred in taking action under Order 3(a) as a debt due from the Respondents.
4. The Respondents will:
 - (a) Provide the Council with a valid and working email address by 30 June 2018 to which the Council can send any invoice issued in reliance on Order



- 3(c);
- (b) Pay any invoice emailed to them in accordance with these orders within 20 days of that invoice being sent by email;
 - (c) Be jointly and severally liable for the actual and reasonable costs incurred by the Council in ensuring compliance with these enforcement orders; and
 - (d) Comply with these enforcement orders from the time they are made and continue complying with these enforcement orders unless they are varied or cancelled by the Environment Court.

The Council seeks that the orders be made on the following terms and conditions:

1. That these orders shall apply the personal representatives, successors, and assigns of the Respondents to the same extent as they apply to the Respondents.
2. The Respondents are to pay the Council's costs in respect of this application and order.

[3] The Council's application for enforcement orders was accompanied by affidavits in support from:

- Scott Morris Dobbie, Monitoring and Compliance Officer employed by the Council;
- Gary Hill McKenzie, Team Leader – Monitoring and Compliance employed by the Council;
- Reginald Frank Proffit, Consents Manager employed by the Council;
- Kathryn Ann Sykes, Team Leader - Environmental Protection employed by the Council;
- Carole Ann Rodgers-Carroll, a laboratory technician employed by RJ Hill Laboratories Ltd (Hill Laboratories) who provided information relating to analysis of samples taken by the Council pertaining to the Property;
- Sally Luci Catherine McKinnon, a Senior Water and Coastal Resources Officer employed by the Council;
- Joshua Paul Smith, Animal Control Officer employed by the Council.

Process

[4] I am satisfied by affidavits of service sworn by Mr Dobbie and Constable R G Powell that the application and related documents were served on both Mr O'Connell and Ms de Cent on 25 May 2018.



[5] Neither of the Respondents filed any formal response to the documents, however on 6 June 2018, Ms de Cent sent an email to the Court stating “Christine de Cent and Dylan O’Connell would like to go to mediation with the Gisborne District Council’s lawyer”.

[6] On 14 June 2018 the Court issued a minute directing (inter alia) that:

- It was premature to refer the matter to mediation;
- The Respondents were to formally advise whether they opposed or consented to the making of enforcement orders. If they opposed the making of orders they were to advise the basis of their opposition and identify persons from whom they would provide affidavit evidence within five working days.

The Court’s minute recommended to the Respondents “in the strongest possible terms” that they took legal advice.

[7] On 22 June 2018 the Court received a letter from Ms de Cent, dated 19 June 2018, stating:

We do not oppose the making of enforcement orders

We have discussed things with the councils lawyer and will get advise ourselves.

Although the letter used the term “we” (obviously referring to both Respondents) it was signed solely by Ms de Cent and the Court did not regard this as an expression of Mr O’Connell’s position.

[8] The Court issued a further minute in response to Ms de Cent’s letter, directing the parties to file a joint memorandum incorporating an appropriate form of consent order no later than 13 July 2018. The minute referred to Ms de Cent’s notification that the Respondents intended to take legal advice as recommended by the Court.

[9] On 13 July 2018 counsel for the Council filed two documents with the Court:

- A memorandum of counsel seeking that the Court make enforcement orders as set out on an enclosed joint memorandum without hearing;
- The joint memorandum referred to which contained draft enforcement orders signed by counsel for the Council and Ms de Cent.



The joint memorandum was not signed by Mr O’Connell notwithstanding that

provision had been made on the document for him to do so.

[10] On 16 July 2018 the Court issued a further minute recording (inter alia) that I was unable to issue a consent order in the absence of consent from Mr O'Connell and must accordingly determine the application. The minute noted that Mr O'Connell had taken no formal steps in respect of the proceedings and that Ms de Cent had consented to the making of an order. On that basis I proposed considering and determining the application "on the papers" and would do so as soon as practicable. This decision is in accordance with that determination.

The Council Application

[11] The terms of the Council application are set out in para [2] (above). As I have noted, the application was supported by seven affidavits. In light of Ms de Cent's consent to the making of enforcement orders and Mr O'Connell's failure to file any formal response to the application I propose summarizing the contents of the affidavits in brief form only.

[12] Mr Dobbie deposed as to a number of inspections and/or observations of the Property and the road reserve outside it which he and other Council officers had made in response to complaints from members of the public. Mr Dobbie's affidavit established the following:

- Ms de Cent is the registered proprietor of the Property. Mr O'Connell resides there with his partner who is Ms de Cent's daughter;
- The Council has received at least 27 complaints from members of the public relating to activities undertaken on the Property and the adjoining road reserve. According to complainants anywhere up to 15 or 20 derelict vehicles might be found on either the Property or the road reserve adjacent to it at any given time. The consistent theme of the complaints was use of the road reserve for the storage of vehicles (frequently in a derelict state) as well as vehicle parts, engines, tyres, industrial steel and general rubbish. It is apparent from the information contained in the affidavit that the above described items were accumulated on the Property itself (where complainants contended that a car wrecking business was operating) and the road reserve;
- Between 2 July 2014 and 26 April 2018, Mr Dobbie and other Council officers had undertaken somewhere in the order of 38 observations



and/or inspections of the Property and the road reserve in response to the complaints. Their visits confirmed the veracity of the complaints including the nature of the material rotting between the Property and the road reserve and use of the road reserve for storage of vehicle parts, derelict vehicles and other rubbish. The Council officers had observed varying numbers of vehicles, sometimes four or five, sometimes seven or eight, sometimes described as “numerous”;

- Photographs appended to Mr Dobbie's affidavit confirmed his and other officers' observations. It is difficult to calculate the number of derelict and/or other vehicles involved from the photographs due to their interspersed with other material and the manner in which they are sometimes stacked on top of or in close proximity to one another;
- Mr O'Connell appears to be the person primarily undertaking the activities which I have described. The affidavit describes numerous interchanges between Mr O'Connell and other Council officers involving oral requests to rectify the situation as well as letters requiring him to do so and advising that he was not entitled to use the road reserve in the manner in question. Sometimes the interchanges led to a temporary improvement and reduction of number of vehicles and the volume of rubbish stored on the road reserve but within a short space of time matters would revert to the original situation;
- Over the period 17 September 2014 until 17 February 2017, the Council had served parking infringement notices, resource management infringement notices and an abatement notice on Mr O'Connell. Mr O'Connell has not appealed the abatement notice nor contested any of the infringement notices, nor paid any of the infringement fees;
- A feature highlighted in Mr Dobbie's affidavit was threatening and abusive conduct on Mr O'Connell's part towards Council officers on numerous occasions.

[13] Mr McKenzie's affidavit confirmed the evidence of Mr Dobbie and contained a number of similar observations.

[14] Mr Proffit referred to use of the Property and the road reserve adjoining it for the storage of vehicles, derelict vehicles, vehicle parts and associated equipment. He deposed that the Property is zoned General Residential in the Tairāwhiti Resource Management Plan (the Plan). He deposed that:



- The Property is one of eight residential properties situated at Seddon Street, Patutahi, a small rural settlement approximately 15 kilometres outside Gisborne City;
- There are residential houses adjacent to and directly across from the Property and a tavern approximately 150 metres down the road;
- Mr Profitt undertook a detailed consideration of the relevant provisions of the District Plan, including the provisions of the various permitted activity standards. He concluded that the activities undertaken by the Respondents on the Property and the road reserve constituted discretionary activities for which a resource consent was required and that no resource consent authorising the activities was held by either of the Respondents.

[15] Ms Sykes deposed that she took soil samples from the road reserve outside the Property on 9 January 2018. On that day she observed a number of vehicles and vehicle parts being stored on the road reserve and could see oil stains on a number of locations on the soil and grass of the road reserve immediately adjacent to the Property. She testified as to the chain of custody for delivery of the soil samples to Hill Laboratories.

[16] Ms Rodgers-Carroll testified as to the analysis process undertaken by Hill Laboratories.

[17] Ms McKinnon reviewed the analysis by Hill Laboratories. She advised that the samples showed high levels of Total Petroleum Hydrocarbons (TPH) which is indicative of heavy fuel oils and lube oils. She deposed that:

TPH in the soil presents potential environmental and human health risks based on exposure pathways and receptors. Potential exposure pathways for the site include soil ingestion/dermal contact or usage of surface water/groundwater. Potential receptors for the site include people living / working on or in close proximity to the site, maintenance and excavation workers, groundwater use, animals in contact with the soils, aquatic ecosystems with waterways on / adjacent to / downgradient of the site and vegetation growing on the site.

Ms McKinnon said that the discharge of liquids containing hydrocarbons onto land at the Property and the adjacent reserve was not allowed by any rules in any of the Council's relevant plans and that a resource consent was required to allow such



activity. No such resource consent is held in respect of either.

[18] The final affidavit I considered was that of Mr Smith who attended the Property in the company of two other Council officers on 9 January 2018 at the time soil samples were taken. Mr Smith carried video recording equipment that he uses as a dog control officer. He deposed as to Mr O'Connell swearing at both Mr Dobbie and himself and provided a copy of the video footage.

Discussion

[19] I am satisfied from the evidence contained in the Council affidavits that the activities undertaken or allowed to be undertaken by the Respondents on the Property and the adjacent road reserve are activities which require resource consent to allow them to be undertaken. No such resource consent is held by either of the Respondents.

[20] I am also satisfied that the activities undertaken or allowed to be undertaken by the Respondents on the Property and the adjacent road reserve are noxious, dangerous, offensive or objectionable¹ to such an extent that they have an adverse effect on the environment. In reaching that conclusion, I have had regard to:

- The numerous complaints made by members of the public about the activities;
- The observations of various Council officers set out in the affidavits provided to the Court;
- Consideration of the photographs appended to Mr Dobbie's affidavit;
- The results of the soil analysis establishing the presence of elevated levels of TPH in the soil, which might reasonably be assessed as having leaked from derelict vehicles and engines placed there by or on behalf of the Respondents.

[21] In light of those findings, I have determined that it is appropriate for me to make orders in the form as set out in the joint memorandum dated 5 July 2017², signed by Counsel for the Council and by Ms de Cent. I am satisfied that:

- The grounds for making an enforcement order contained in ss



¹ In the sense described in the *Tasman Action Group* case: *Tasman Action Group Inc v Inglis Horticulture Ltd* Decision C126/2007.

² The memorandum was received on 13 July 2018 and the date on the memorandum (2017) is clearly in error.

314(1)(a)(i), 314(1)(a)(ii), 314(1)(b)(i), 314(1)(b)(ii) and 314(1)(c) RMA have been established;

- It is appropriate for me to make an order pursuant to s 314(1)(d) requiring the Respondents to meet any reasonable costs which the Council might incur in avoiding, remedying or mitigating the adverse effects which I have described, should the Respondents fail to do so;
- It is necessary for me to make an order pursuant to s 315(2) allowing the Council to give effect to the orders which I have determined are appropriate to be made because of the extended history of failure of the Respondents to comply with verbal requests, formal written requests and an abatement notice seeking their compliance.

[22] In each case, the various orders made are to be complied with within 20 working days of service of the orders on the Respondents. The Council is to effect service and confirm in writing to the Court the date on which service is effected.

Outcome

[23] Enforcement orders are made in the terms contained in the joint memorandum of 5 July 2017 subject to any amendments or additions required to give effect to this decision. The Council is requested to urgently submit enforcement orders for execution accordingly. The orders should allow a period of 15 working days from service for compliance.

Costs

[24] Costs are reserved in favour of the Council against both Respondents. Any costs application to be made and responded to in accordance with the Environment Court Practice Note 2014.

Advisory Matters

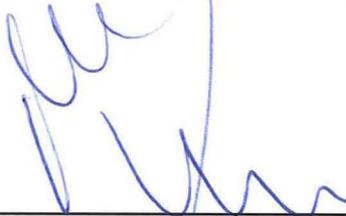
[25] I am conscious of the fact that neither of the Respondents has been represented by counsel in the course of these proceedings. Under those circumstances I consider it is appropriate for me to advise them as to the following matters:

- Failure to comply with the terms of the enforcement orders is a criminal offence for which the Respondents (or either of them) might be



prosecuted. The maximum penalty on conviction is a fine not exceeding \$300,000 or imprisonment for a term not exceeding two years;

- In the event that the Respondents fail to comply with the orders the Council is authorised to undertake the various works required by them and to enter on to the Property to do so. The Respondents are jointly and severally liable to meet the costs of the Council doing so;
- Any costs which remain unpaid may be secured by the Council by registering a statutory land charge against the title to the Property;
- Finally (as I have done previously) I recommend to the Respondents that if they have any queries regarding these matters, they urgently take legal advice.



B P Dwyer
Environment Judge

