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

Decision No. [2018] NZEnvC 144

IN THE MATTER	of the Resource Management Act 1991
AND	of an applicant for ex parte and interim enforcement orders pursuant to s 320 of the Act
AND	of an application for costs under s 285 of the Act
BETWEEN	AUCKLAND COUNCIL
	(ENV-2018-AKL-102)
	Applicant
AND	KI BRAINES

Court:	Environment Judge JA Smith sitting alone pursuant to s 279 of the Act in chambers in Auckland
Submissions:	B Watts and D Collins for Auckland Council (the Council) KI Braines for himself
Date of Decision:	22 AUG 2018
Date of Issue:	22 AUG 2018

DECISION AS TO COSTS

A: The Court orders KI Braines to pay as a contribution towards the costs in respect of the ex parte and interim enforcement order the sum of $15,000.00. Payment in the said sum may be enforced in the District Court at Auckland if required. The proceedings are otherwise at an end.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

Introduction

[1] The Auckland Council sought ex parte orders against Mr Braines that were granted by Judge Kirkpatrick under Decision [2018] NZEnvC 89.

[2] Subsequently, Mr Braines sought a review of that decision as it was made without notice to him, and the Court made interim enforcement orders in Decision [2018] NZEnvC 115. Both decisions are self-explanatory.

The ex parte interim enforcement order

[3] The initial application for orders were made ex parte on the basis that the site was being used in excess of the residential activities permitted, and that the wastewater systems were not operating properly. This evidence was based upon expert evidence from Mr Ormiston. The Court notes that it made the orders ex parte because of its concerns about:

(a) increased danger to users of the property by way of exposure to pathogens;

(b) increased risk to the environment from the discharge of inadequately treated sewage;

(c) risks of offensive odours;

(d) increased risks of unlawful tenancies being established; and

(e) increased risk of adverse effects on human health.

[4] Part of the application was based upon an assertion in relation to methamphetamine-associated contaminants on the site. The Court did not accept that evidence, or that there was any breach of s 15(1)(b) of the RMA. Nevertheless, it appears to have militated the obtaining of search warrants and the actions of Council officers and Police in occupying the site for a period, alleged by Mr Braines to be some two days. By the time the matter was remitted to this Court for review, Mr Braines had been informed of the actions and had taken immediate steps to have the septic tanks cleaned and the position otherwise regularized.

[5] The Council acknowledged this in their application for costs, where they say:

> The applicant acknowledges that since being served with the interim enforcement orders, the Respondent has engaged with both the Respondent and the Court and has undertaken works on the site so that it now complies with the orders. However, it is submitted that the Respondent would have continued to offend if the Applicant had not pursued legal action.

[6] In the end result, with the consent of Mr Braines orders were made by the Court relating to regularising the occupation of the buildings, with the exception of the main house. The interim enforcement orders themselves are relatively unexceptional, and the major issue of contention in relation to the question of costs is whether the significant action of the Council, without notice to Mr Braines, was warranted in the circumstances, and whether those costs should be visited upon Mr Braines personally.

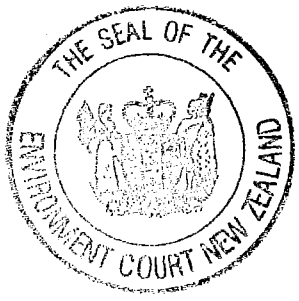
[7] Mr Braines expresses strong opinions on the actions of the Council and notes in particular that:

(a) the property has been rated by the Council as a multi-tenancy for some years;

(b) he alleges that the search warrant was executed for two days with five Council officials and five Police staff, with a search warrant inside the buildings being conducted;

(c) that the same sewage system had been utilised since 2013 when this matter last came before me and a consent order was made.

[8] It is clear that in part the application for interim orders was based on the fact that Mr Braines was not resident in New Zealand, and it is not clear what steps had been taken by the Council to try and contact Mr Braines prior to taking this significant action against him. Although Mr Watts repeatedly asserts that, if the Council had not taken this action then Mr Braines would not have cooperated, there is no evidence that I am able to see which shows that this would be the case. Given that the previous case was resolved by consent orders agreed to by the Council, and the present case has again been resolved with the Court only having to decide issues in respect of the main housing unit, it is difficult to see that there is any history of non-compliance by Mr Braines that warrant the action taken, and the significant application for costs.



The application for costs

[9] The application for costs consists of several elements (excluding all GST):

(a) legal fees - $57,531.50 (time sheets only produced);

(b) expert witness fees - $6,646.00 (Mr Ormiston);

(c) locksmith - $450.00;

(d) service costs - $240.00;

(e) Watercare safety - $591.00

[10] Mr Watts quotes *Waimakariri District Council v Addie*[1] in relation to enforcement proceedings. He notes that there is no principle that costs follow the event and that the Court holds a general discretion. He goes on to identify the following factors from the *Addie* decision:

> [6] Though costs awards are subject to a broad discretion, an approach to principled consideration of relevant factors should be adopted. We consider the following categories of factors are relevant:
>
> (a) Factors going to the conduct of the hearing as noted in *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.[2]
>
> (b) Factors going to content of hearing including complexity.
>
> (c) Factors of public interest such as whether the matter is a test case, the public duty and other similar matters.
>
> (d) Factors relevant to the parties including
>
> - potential effect on the respondents
> - ability to pay costs
> - importance of the outcome
>
> (e) Outcome of the case including the clarity of the issue decided.

[11] The Applicant submits that the following factors are particularly applicable:

(a) a public interest and duty;

(b) the respondent's history of non-compliance.

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[1] EnvC C203/2000 at [6]

[2] In *Bielby* the High Court indicated that a higher quantum of costs is appropriate where certain factors are present

Public Duty

[12] In relation to the public duty in this case, there is no duty for the Council to undertake ex parte applications, or even interim enforcement proceedings. The Council, both under the Building Act and under the RMA, has a wide range of options available, which usually include steps such as warnings, advice, notices to fix (Building Act), abatement notices and the like. Here, a decision was made by the Council that the septic tank was full with solids and was unmaintained. Mr Braines contests much of this evidence, but I need not revisit it given that this evidence was largely accepted by the Court in making the ex parte interim decision. What is clear from the evidence is that there was a risk of contamination, but there was no evidence that the property owners had been warned of the problem or asked to undertake remedial work.

[13] Mr Braines goes into some detail as to why he considers that this was an unnecessary action in the circumstances. He points to the fact that these issues have been addressed by the Court, and in discussions with the Council, in 2013. There is a dispute between the parties as to what arrangements were made, but it is clear that the Council advised the Judge on the ex parte application of the orders made and the previous issues.

[14] On the other hand, Mr Braines remains deeply concerned that:

> Council had people search all our homes, temporary or permanent, and all garaging top to bottom, seizing our computers, bank records, searching of private drawers and cupboards, bedrooms, bathrooms and our dwellings, herding all tenants out of their own dwellings under numerous police supervision... and totally blocked off the Fowler Access Road entrance on the first day. How on earth can Council justify these actions when all Council staff had to do was knock on the door and discuss with the property owners any potential issues they had concerns with?

[15] The response of the Applicant is that much of what the Council officers needed to inspect was located inside the various dwellings (paragraph 7.2, Council reply).

> The respondent may not appreciate that the Council's inspection powers do not extend to entering a dwelling without the occupant's consent unless they have a search warrant. Nor would the Council officers have had the power to seize documentary evidence without a search warrant. The use of a formal search was necessary in the circumstances, dealing with multiple illegal dwellings and their respective tenants.

[16] The Council goes on to say (paragraph 7.2(c) and (d)):

> (d) The situation was of the Respondent's own making. It is the Respondent who has used his property in contravention of District Rules about dwellings, Regional Rules about wastewater discharges and the 2013 Court order as regards temporary accommodation only. One of the risks of behaving in that way is that enforcement action may be taken and costs may be sought. The ratepayers of Auckland should not bear that risk on the basis of the Respondent's claim that he would have complied with it.

(e) With respect, the Respondent's past and current conduct suggests that informal requests for compliance would be unlikely be met with success in a reasonable timeframe.

[17] It is not clear what evidence Mr Watts is referring to that was gained from inspection inside the houses. It may be that this was to establish permanent occupancy, or the presence of bathrooms or kitchens, however this was not explained. Nor does it explain why two searches were necessary, involving taking of computers, records and the like. Given that the orders were largely agreed between the parties (subject only to the question of occupancy of the main dwelling) it is difficult to see that the actions taken by the Council were justified at the time or in retrospect. There is no evidence suggesting that there had been a refusal by the owner to undertake the emptying of the septic, or that the situation in respect of the accommodation had been clarified.

History of non-compliance

[18] There seems to be an assumption that because an enforcement order had been made by an agreement at an earlier time this proved an ongoing non-compliance. With respect, this does not follow. The previous orders made by the Court were made with the consent of the parties, and involved connections of several buildings and at least temporary accommodation of them. The scope of that accommodation was not the subject of any detailed analysis by the Court given that it was agreed between the parties. To assert that this shows non-compliance by Mr Braines I conclude goes significantly too far. As I have already noted, the Council, both in their submissions and at the Court hearing, acknowledged Mr Braines' cooperation as soon as he was aware of the circumstances.

[19] It appears that Mr Braines has resided for some time in Australia, and in 2013 resided in America (at least Mr Braines asserts this). If that is the case, this may explain the ex parte application, although I can see no indication that the Council has undertaken any detailed steps to engage with Mr Braines, or obtain his location, prior to undertaking the application for ex parte orders.

Ex parte orders

[20] Ex parte orders are very unusual in this Court, and this is one of a very small number that have been granted. The concern of the Court at that time related to the effluent, and this matter appears to have been remedied as soon as it was drawn to Mr Braines' attention. It is difficult to see that the scale of the search warrant and the steps

taken were justified in the circumstances, although it may have been for the purposes of obtaining evidence in respect of the collateral criminal proceedings. If so, that is a matter that can be addressed as part of that case in due course.

[21] The file indicates that a search warrant was issued by Authorised Issuing Officer # 8562 on 10 April 2018, although Council officers had already undertaken a site visit on the invitation of a tenant. The warrant was not issued by a Judge.

[22] It is clear from Mr Randall's affidavit of 1 June 2018, supporting the ex parte orders, that there were no discussions with Mr Braines prior to exercising the search warrant.

[23] Mr Randall states the search started on 18 April at 9.45am and ended around 12.35pm. A second search was exercised under the same warrant on 23 April, conducted between 9.35am and 1.55pm. Mr Randall says in his affidavit this was:

> ... in particular to inspect all the waste water systems with drainage experts as our search on 18 April had been inconclusive in that regard...

[24] Mr Randall notes that Mr Braines said that he had emailed the Council in the interim, challenging the Council actions and seeking a response. Mr Randall denied receiving the email from Mr Braines.[3] This may be due to Mr Braines misaddressing the email to Mr Randall.[4]

[25] The discovery that the septic tank for Buildings A and C was full with solids was only discovered after earthworks to a depth of 600mm exposed the tank. There is no reference to surface contamination. An inspection chamber was recommended and Mr Braines discussed this with the drainage contractor on site.[5]

[26] The reference to a contaminated soil sample appears to relate to Buildings D and E.[6] Mr Braines says this sample did not show septic tank contamination. Building B appears to have been "plumbed" into the same system.[7] Earthworks by digger exposed the relevant septic tank.[8] The samples were taken from the tank, which had no overflow

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[3] Paragraph [5.52]
[4] Pparagraph [5.54]
[5] Paragraph [5.69]
[6] Paragraph [5.72]
[7] Paragraph [5.74]
[8] Paragraph [5.76]

pipe.[9] Those samples were consistent with effluent (as was clear). In short, the evidence of Mr Ormiston was that the septic systems were overloaded, and would require either a reduction of input or substantial upgrading.

[27] Importantly, Mr Randall's affidavit does not suggest why ex parte orders were necessary, or why an abatement notice and/or notice to fix was not appropriate. Ms Vidovic's affidavit does not address this issue. Mr Ormiston addresses technical issues and not reasons for ex parte or interim enforcement orders.

Costs on ex parte orders

[28] The Application does not advise why an ex parte order was required, given the contact with Mr Braines and his immediate attempts to resolve the issues. The Memorandum filed in support emphasises the breaches and potential consequences, but does not address why the application should be dealt with ex parte.

[29] Mr Watts notes:

> 15.2 Further, it is submitted that the basis for "the interim orders is compelling and clear. It is difficult to imagine what the respondent could contribute were he given the opportunity to present evidence or address the court"

[30] As it now transpires, Mr Braines seems to have been taking steps to comply and was not advised of the issues fully prior to the application. While the Judge was properly entitled to make interim orders (and clearly he did so here) that does not justify full costs.

[31] In short, there are no grounds whatever for the assertion by Mr Watts that notice to Mr Braines would have been ignored. Given that Mr Braines sought to retain the drainlayer for the full septic tank he observed during the 23 April search, the failure to communicate with him must be regarded as serious.

[32] I must conclude that Mr Braines' is justified in his contention of a complete over-reaction and refusal to identify Council's concerns with Mr Braines led to the situation not being remedied earlier, and to the ex parte notice and interim enforcement order. This Court relies on such ex parte applications being made "in extremis" where the owner cannot be contacted or refuses to engage.

[9] Paragraphs [5.76]-[5.77]

[33] This issue was previously addressed by Consent order in 2013. There is a clear expectation Council would address its concerns relating to the same issues with Mr Braines before seeking orders.

[34] Mr Watts asserts:

> The respondent now claims that he would have complied if the Council had spoken to him. It is impossible to know whether that is truly the case. The fact is that the Respondent was disobeying the 2013 Court order, and in fact had gone further by establishing at least one additional dwelling since that time. The Applicant reasonably suspected that the Respondent would not cooperate and comply unless firm measures were taken.

[35] I do not accept there is any evidence of refusal to cooperate and comply. To the contrary, Mr Randall's evidence and Mr Watts' concession show immediate action to regularize the septic tanks and engage relating the alleged non-compliance. Mr Braines asserts he emailed Mr Randall after 18 April 2018. Mr Watts confirms cooperation after the enforcement order.

[36] Beyond any civil remedies that might be available to Mr Braines, the ex parte and interim application procedure should not be used to punish ratepayers. This Court relies on counsel adopting a measured approach to such applications. Even where such orders can be justified, costs orders do not automatically follow. I am not satisfied the extensive costs for the ex parte and interim applications are justified.

[37] For current purposes, I am not satisfied that this matter justifies the significant costs and expenses claimed. In all probability, the same outcome would have been achieved with the issuing of an abatement notice or an application on notice for interim enforcement orders. It may have been resolved by discussing the issues with Mr Braines. There is no particular complexity to the matter that I am able to ascertain, and the legal costs incurred are well beyond any reasonable figure that this Court would impose.

Outcome

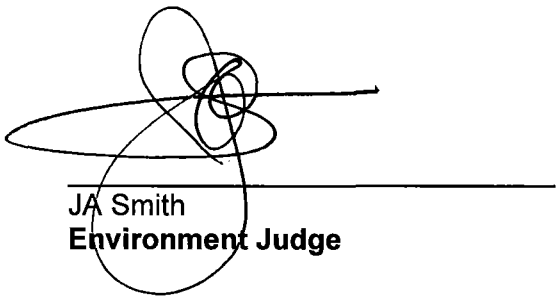
[38] In the circumstances of the case, I have concluded that Mr Ormiston's expert witness costs of $6,646.00 excluding GST should be reimbursed in full, and the Watercare sampling costs of $591.00 plus GST should also be reimbursed.

[39] In respect of the other costs, including the locksmsith (no justification is given for these costs), document service and legal fees I am prepared to only make a nominal award in respect of those costs.

[40] In the circumstances of this case I make an award in the sum of $15,000 being full reimbursement for expert and water sampling costs and a nominal sum (around $8,000) in respect of the legal and other costs. The other costs relate to addressing the dispute as to the Court interim orders only heard before me.

[41] In looking at the matter in broad terms, I consider that the Act intends that reasonable costs should be met where these are justifiable in the circumstances. This costs award is reduced considerably to recognise the significant over-reaction of the Council in the circumstances of this case.

[42] On the other hand, I recognise that this payment will, nevertheless, be a significant cost to Mr Braines. He should have ensured that the water disposal system was kept up to standard, and also that he complied with the relevant plans as they relate to multiple tenancies on the site. Nevertheless, I conclude that the matter could have easily been rectified by contact with the owner and/or the tenants to ensure the matter was regularized as soon as possible.



JA Smith
Environment Judge