

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

Decision No. [2018] NZEnvC 198

IN THE MATTER of the Resource Management Act 1991
AND of an appeal against an abatement notice
under s 325 of the Act
BETWEEN AQUASTAR HOLDINGS LIMITED
(ENV-2017-AKL-000114)
Appellant
AND KAWERAU DISTRICT COUNCIL
Respondent
AND of an application for enforcement orders
under s 314 and 316 of the Act
BETWEEN KAWERAU DISTRICT COUNCIL
Applicant
(ENV-2017-AKL-000127)
AND AQUASTAR HOLDINGS LIMITED
Respondent
AND of an application for consent under s 315
of the Act
BETWEEN KAWERAU DISTRICT COUNCIL
(ENV-2018-AKL-000257)
Applicant
AND AQUASTAR HOLDINGS LIMITED
Respondent

Court: Environment Judge DA Kirkpatrick

Date of Correction: 9 OCTOBER 2018

Date of Issue: 9 OCTOBER 2018



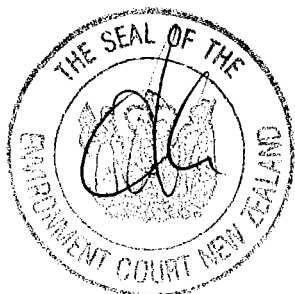
CORRECTION

Introduction

- [1] On 15 June 2018 the Court made enforcement orders against Aquastar Holdings Limited (**Aquastar**) in decision [2018] NZEnvC 091 (**Enforcement Decision**).
- [2] On 28 September 2018 the Court then granted consent to Kawerau District Council to carry out some of the enforcement orders on Aquastar's behalf, in decision [2018] NZEnvC 185 (the **Consent Decision**).

Correction sought

- [3] Counsel for the Council has since observed that the legal description of Aquastar's property is wrongly described in both the Enforcement Decision and the Consent Decision, as Lots 39, 40 and 41 DPS **6531**.
- [4] The correct legal description is Lots 39, 40 and 41 DPS **6351**.
- [5] If the Council complies with the enforcement orders on Aquastar's behalf and Aquastar fails to pay the Council's costs in doing so, the Council will then register that debt as a charge on the property under the Statutory Land Charges Registration Act 1928 in accordance with s 315(3) of the Act.
- [6] If the legal description is inaccurate in the Enforcement Decision and Consent Decision then there is a risk that the Registrar will refuse to register the charge and the Council will be unable to secure the debt.
- [7] Therefore, the Council has requested that both the Enforcement Decision and the Consent Decision be corrected and reissued so that the legal description of the property is stated as Lots 39, 40 and 41 DPS 6351.



Correction

[8] In accordance with s 278 of the Act and Rule 11.10 of the District Courts Rules 2014, the Court has the power to correct errors including accidental slips or omissions. Rule 11.10 is set out as follows:


11.10 Correction of accidental slip or omission

- (1) A judgment or order may be corrected by the court or the Registrar who made it, if it—
 - (a) contains a clerical mistake or an error arising from an accidental slip or omission, whether or not made by an officer of the court; or
 - (b) is drawn up so that it does not express what was decided and intended.
- (2) The correction may be made by the court or the Registrar, as the case may be,—
 - (a) on its or his or her own initiative; or
 - (b) on an interlocutory application.

[9] As the error in the legal description of the property was an accidental slip, it is appropriate that it is corrected.

[10] Accordingly, both decisions [2018] NZEnvC 091 and [2018] NZEnvC 185 are corrected so the correct legal description of the property is recorded as Lots 39, 40 and 41 DPS **6351**.

[11] The corrected decisions are attached to this correction as **Annexure A**.



The seal of the Environment Court of New Zealand is circular, featuring a central coat of arms with a crown on top. The text 'THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND' is inscribed around the perimeter of the seal.

D.A. Kirkpatrick
Environment Judge

Annexure A

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

Decision No. [2018] NZEnvC 091

IN THE MATTER of the Resource Management Act 1991
AND of an appeal against an abatement notice
under s 325 of the Act
AND of an application for enforcement orders
under s 314 and 316 of the Act
BETWEEN AQUASTAR HOLDINGS LIMITED
(ENV-2017-AKL-114)
Appellant/Respondent
AND KAWERAU DISTRICT COUNCIL
Respondent/Applicant
(ENV-2017-AKL-127)

Court: Environment Judge DA Kirkpatrick sitting alone under ss 279 and
309(1) of the Act
Hearing: On the papers
Date of Decision: 15 June 2018
Date of Issue: 15 June 2018

**DECISION OF THE ENVIRONMENT COURT ON APPEAL
AGAINST ABATEMENT NOTICE AND APPLICATION
FOR ENFORCEMENT ORDERS**

- A: The appeal by Aquastar Holdings Limited against the abatement notice issued on 12 July 2017 by the Kawerau District Council is dismissed.
- B: The Court makes the following enforcement orders under sections 314(1)(a)(i), 314(1)(b)(i) and (ii), 314(1)(c), 314(d) and 314(1)(da) of the Resource Management Act 1991:

Aquastar Holdings Limited (**Aquastar**), in respect of the property at 55 Onslow Street, Kawerau, legally described as Lots 39, 40 and 41 DPS 6351 (the




AQUASTAR HOLDINGS LIMITED

Property), is required to do the following:

- (a) Cease contravening Rule C1.4.6 Verandahs of the Operative Kawerau District Plan (the **Plan**); and
 - (b) Take all necessary action to ensure the verandah at the Property complies with the Rule C1.4.6 of the Plan, including by:
 - (1) Within one month of the date of these orders, providing the Kawerau District Council with a report from a suitability qualified engineer as to the integrity and weathertightness of the verandah at the Property against the requirements of Rule C1.4.6 of the Plan and setting out the remedial action required to ensure compliance with Rule C1.4.6 of the Plan;
 - (2) Within two months of the date of these orders, undertaking the remedial action detailed in that above-mentioned report to the extent necessary to ensure compliance with Rule C1.4.6 of the Plan;and
 - (3) Undertaking any other action the Court considers reasonably necessary to ensure compliance with Rule C1.4.6 of the Plan and to avoid, remedy or mitigate the adverse effects on the environment resulting from Aquastar's non-compliance with Rule C1.4.6 of the Plan; and
- (c) Reimburse the Kawerau District Council for the actual and reasonable costs and expenses which the Kawerau District Council has incurred and incurs in avoiding, remedying or mitigating any adverse effect on the environment as a result of Aquastar's non-compliance with Rule C1.4.6 of the Plan, the abatement notice dated 12 July 2017 and associated provisions, including ss 9 and 323, of the Act.

- C. Costs in these proceedings are reserved and directions are given as to a timetable for determining costs.



REASONS

Introduction

[2] This is a case about a verandah on the frontage to a block of shops in Kawerau.

[3] On 12 July 2017, the Kawerau District Council (**the Council**) issued an abatement notice to Aquastar Holdings Limited (**Aquastar**) requiring it to repair the verandah on the property at 55 Onslow Street, Kawerau, in the Commercial 1 zone, to a standard that complies with rule C1.4.6 - Verandahs of the operative Kawerau District Plan, within forty days of the date of the notice. In particular that rule includes a requirement that "[t]he roof covering any verandah shall be weather resistant material and shall be connected to the piped street storm water system."

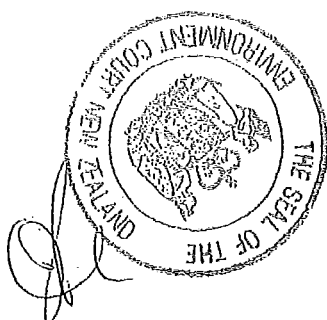
[4] The Council allege that the roofing and guttering material of the roof of the verandah was in a state of disrepair so that water was penetrating into the timber structure, causing it to decay to the point where the soffit lining on the underside of the verandah was becoming loose, and may present a danger to the public. The notice required Aquastar to engage an engineer to inspect the structure and provide a report on its integrity to confirm that it was not dangerous or posing a hazard, or otherwise specify what repairs are required and carry out such repairs within the forty-day period.

[5] On 1 August 2017, Mr Stephen Bhania, on behalf of Aquastar, wrote to the Council stating that the work had been carried out and asking the Council to either cancel the abatement notice or to extend the compliance date.

[6] On 2 August 2017 Ms Jasumati Bhana, a director of Aquastar, lodged a notice of appeal against the abatement notice with the Court.

[7] The grounds of the appeal are:

- (a) the problems with the verandah had been rectified by a plumber, who had cleared the debris causing the blockage in the gutters as long ago as May 2016;
- (b) that the Council had been notified of this;
- (c) that no further issues or other correspondence from the Council had been



received until the abatement notice was served;

- (d) photographic evidence of water dripping on the concrete path by the shop fronts may have been caused by further blockages to the gutters;
- (e) that while the underside of the verandah requires painting, there has been no deterioration of the linings;
- (f) that the appeal was necessary as the Council's actions in issuing an abatement notice without any prior notification could lead to Court proceedings; and
- (g) rectification of the problem did not require an engineer's report with unnecessary costs when rectification of the leakage can be easily fixed.

[8] On 29 August 2017, Ms Bhana filed an application for a stay of the abatement notice, together with her memorandum and affidavit in support. Essentially, Aquastar sought time to negotiate with the Council to resolve the issues arising from the abatement notice.

[9] On 28 August 2017, the Kawerau District Council applied for an enforcement order against Aquastar together with supporting affidavits from Christopher William Jensen, Trevor Ross Quilty and Sharlaine Lucia Anapu. This application sought essentially the same outcome as the abatement notice, and on essentially the same grounds.

[10] On 1 September 2017, the Council filed an affidavit of service of Karen Maree Wilson in relation to the application.

[11] On 4 September 2017, I directed that Aquastar's appeal and the Council's application be case managed together and be referred to Court assisted mediation. I granted a stay of the abatement notice pending mediation, and I directed that the Council provide a further report within seven days of the conclusion of mediation.

[12] The Court registry arranged for mediation to occur in Kawerau on 18 October 2017, and on 4 October 2017 Ms Bhana for Aquastar sought an adjournment on compassionate grounds, which the Council did not oppose.

[13] Mediation never occurred. Further reports were provided, including indications from Aquastar that it was seeking a contractor to undertake works on the verandah.



[14] On 14 December 2017, I convened a judicial telephone conference because I was concerned at the lack of progress that had been made towards resolution of the appeal and the application. After some discussion, I made directions, with the agreement of the parties, that Aquastar was to file and serve, by 2 February 2018, either evidence that the repairs to the verandah had been done to the reasonable satisfaction of the Council, or that it had a suitable contractor to do those repairs within a time period to the reasonable satisfaction of the Council, or else, if the work had been done or there is no contract, then Aquastar was to file and serve its evidence in relation to both proceedings. If such evidence were served, then the Council was to file and serve its evidence by 16 February 2018, and the Court would arrange a one day hearing to be held in Whakatāne in late February or early March 2018.

[15] On 2 February 2018, Ms Bhana advised there would be a slight delay in forwarding evidence of repairs or a contract, and advised that it would be provided on either 4 or 5 February. On 5 February, Ms Bhana provided a copy of a letter indicating that a contractor would undertake the repair or replacement of the verandah by 28 February 2018.

[16] On 16 February 2018, the Council provided a memorandum noting that no contract of work had been provided, that the Council had communicated with Aquastar about the details of the works and the contract for them. The Council stated that, had that information been forthcoming, then it would not have wished to proceed to a hearing. However, the Council did not receive a response to its letter. The Council accordingly sought directions for Aquastar to provide such further details by 21 February, and to report to the Court by 28 February that the remedial work had been carried out, with the Council to report to the Court by 21 March advising whether it was satisfied, the month in between being to allow time to assess the weather-tightness of the works. I made directions as sought by the Council on 19 February 2018.

[17] On 22 February, Ms Bhana for Aquastar filed a memorandum in which she stated that it had come to Aquastar's attention that the Council had held a meeting to discuss the issue of shop verandah's in the area in which it had been said that the Council wanted the verandahs "revamped or modified to be aesthetically pleasing or even pulled down". On that basis, Aquastar sought that the timetable be put on hold.

[18] The Council responded by memorandum the same day opposing the application for the timetable to be put on hold and advising that the meeting to which Ms Bhana was



referring had been held on 19 January 2018 to discuss a number of issues as part of early engagement for the preparation of the Kawerau Long Term Plan, and that while some attendees had raised the issue of improving or redeveloping buildings in the town centre and unsafe building verandahs, the Council had no intention of removing or modifying any of the verandahs. The memorandum also noted that the Council had no power to undertake such works on private land. The Council's memorandum went on to note that Aquastar had still not provided further details about its proposed works, and that the Council was increasingly concerned about delays. The Council sought that, if Aquastar did not comply with the current timetable, then the matter should be set down for hearing.

[19] Also on 23 February 2018, I refused Aquastar's request to suspend the timetable.

[20] On 12 March 2018, the Council sought case management directions. It advised that Aquastar had not complied with the timetable directions, and that monitoring of Aquastar's property showed that there had been no progress made towards carrying out any remedial work. It also noted that Aquastar had not stated whether it opposed the Council's application for enforcement orders, and accordingly sought case management directions setting a timetable for Aquastar to do so and consequential directions so that the proceedings would be ready for hearing sometime after 9 April 2018. I made those directions on 14 March 2018.

[21] Aquastar did not comply with the direction to advise the Court of whether it opposed the application for enforcement orders or maintaining its appeal against the abatement notice. Aquastar had also not filed or served any evidence. The counsel submitted that the Court could grant the application for enforcement orders and dismiss the appeal on the basis that Aquastar had not opposed the application and had not complied with the Court's directions in respect of that application or its appeal. If the Court were not minded to deal with the proceedings on the basis that Aquastar has taken no steps, then the Council submitted that the matter could be determined on the papers.

[22] On 29 March 2018, I directed that these proceedings would be decided on the papers as they stood at that time, on the basis that Aquastar had not complied with the Court's directions.

[23] On 3 April 2018, Ms Bhana for Aquastar advised that the verandah had been replaced, there should be no further issues and the file should be closed. In response,



the Council advised by memorandum dated 5 April 2018, that the Council building inspector had visited the property on 3 April 2018, seen that some roofing material appeared to have been replaced with second-hand material, but considered that the work did not meet the requirements of the building code in terms of durability and external moisture, and therefore that the Council considered that the remedial work was not satisfactory. I directed the parties that I would continue to consider the matters on the papers, but including the most recent memoranda.

[24] On 9 April 2018, Ms Bhana filed a memorandum taking issue with the Council's previous memorandum, stating:

- (a) the roofing material had been replaced with quality second-hand roofing material, which is durable and moisture proof and similar to other adjoining verandahs, and providing samples of the roofing material;
- (b) there was no rain on 3 April 2018, so the building inspector could not have determined the issue of moisture penetration;
- (c) the remedial work is more than satisfactory under the Building Code and the abatement notice;
- (d) on replacing the verandah roof, no timber decay was found;
- (e) the delays had only been a few days due to lack of tradespeople because of the Edgecombe floods;
- (f) there had never been any danger to the public;
- (g) the Court should consider a sample of the material used;
- (h) Aquastar had not been given an opportunity to address the Council's latest memorandum, resulting in a miscarriage of justice should the Court not consider this latest memorandum;
- (i) the Court had not requested photographs to support the position taken by the Council;
- (j) should the matter be determined on the papers, there should be no costs awarded against Aquastar as the Council did not give any warning of the issue of the abatement notice, and Aquastar had been unfairly victimised; and



(k) Aquastar would want to be heard on the issue of costs.

Discussion

[25] A central purpose of the enforcement provisions in the RMA, including the provisions in ss 314 – 321 relating to enforcement orders and those in ss 322 – 325A relating to abatement notices, is to enable a territorial authority to enforce the observance of its district plan made under the RMA, as required by s84 RMA. This in turn enables a territorial authority to ensure, in terms of the fundamental requirement of s 9 RMA, that people do not use land in a manner that contravenes a district rule unless the use is expressly allowed by a resource consent or is allowed under existing use rights in ss 10 or 10A.

[26] In this case the Kawerau District Plan contains Rule C1.4.6 – Verandahs, which provides as follows:

C1.4.6 Verandahs

The following rules shall apply in the Commercial Zone Area 1:

- a) Every building shall be provided with a verandah the function of which is to provide continuity of shelter between adjoining sites.
- b) Where a verandah is erected to abut an existing verandah, the junction of such verandah shall be made weatherproof.
- c) Any new or refurbished verandah shall provide in its design for a visual continuity between any existing adjoining verandah(s) and the proposed verandah.
- d) The roof covering any verandah shall be weather resistant material and shall be connected to the piped street storm water system.
- e) Ceilings of verandas shall be painted and any glazing used shall meet the requirements of the New Zealand Building Code 2005.

[27] The relevant objective in relation to that rule appears to be C1.2.1.2: "Maintain and enhance the role of Commercial Zone Area 1 as the town centre of Kawerau" and the corresponding policy appears to be C1.2.2.5 – "Enhance the pedestrian character and amenity of Commercial Zone Area 1 as an attractive and safe environment for pedestrians."

[28] The chronology set out above is in some detail to show how the issue between Aquastar and the Council unfolded. In particular, the chronology demonstrates the opportunities afforded to Aquastar to address the issue originally raised in the Council's abatement notice and then in the Council's application for enforcement orders without needing to engage in a contested hearing. Regrettably, while Aquastar's representatives indicated throughout that they were willing to engage with those opportunities, ultimately they did not present evidence to demonstrate compliance with Rule C1.4.6 and nor did they take opportunities to mediate or otherwise settle the issues between them and the



Council.

[29] Ultimately, the failure by Aquastar to comply with the Court's directions means that the Court must return to the evidence which it does have, being the affidavits filed by the Council in support of its application for enforcement orders, and determine the appeal against the abatement notice and the application for enforcement orders on that basis. In doing so, I acknowledge that the representatives of Aquastar have lodged various communications with the Court containing assertions of compliance and refutations of the Council's evidence. They have not, however, provided evidence to substantiate those assertions and refutations notwithstanding the Court's directions to do so. In determining the appeal and the application, the Court is bound to prefer evidence over assertions.

[30] The application has attached to it a copy of the computer freehold register with identifier SA1758/78 in respect of Lots 39, 40 and 41 on Deposited Plan South Auckland 6351, which is the legal description of the property at 55 Onslow Street, Kawerau, showing the proprietor to be Aquastar Holdings Limited.

[31] The evidence of Mr Jensen deposes that he has been the Manager – Planning, Compliance and Capability for the Council for over 13 years and is responsible, among other things, for ensuring compliance of verandahs with the Plan. Following concerns expressed by members of the Council, he instructed Mr Quilty to undertake inspections in the Kawerau central business district in early 2015. These revealed that the verandahs of 10 properties were no longer weathertight, including that of Aquastar. Plans were made to send letters to the property owners but unfortunately due to health issues Mr Jensen could not progress that until April 2016. The letters advised owners of the requirements of the Plan and asked them to carry out repair work and inform the Council when that had been done. Reminders were sent in May 2016. Mr Bhana on behalf of Aquastar responded that they had instructed a plumber to do the work. Inspections by the Council in September and November 2016 and March 2017 showed that the work had not been done. Mr Jensen produced photographs taken during those inspections which tend to confirm that evidence.

[32] Mr Jensen notes that the Whakatane or Edgecumbe floods in April 2017 prevented follow-up action until July 2017. By that time, eight of the properties (including Aquastar's) still did not comply with the Plan. The Council issued abatement notices to four owners, including Aquastar, on 12 July 2017. Mr Jensen deposes that he had a conversation with Mr Bhana on behalf of Aquastar about the time allowed for compliance with the notice,



being 40 days and says that he told Mr Bhana that the Council was willing to cooperate with owners provided there was evidence of steps taken to comply, such as by engaging an engineer and advising a date when the works would be carried out. Aquastar applied to the Council for cancellation of the abatement notice on 1 August 2017 and this was declined the next day. The notice of appeal was lodged immediately. At that point the Council considered it prudent to apply for an enforcement order.

[33] Mr Quilty deposes that he has been a building control officer employed by the Whakatāne District Council for four years, having previously worked for the Rotorua District Council for 18 months and as a carpenter for approximately 15 years. He holds diplomas in carpentry and building surveying. He was seconded to the Council between April 2015 and September 2016.

[34] Mr Quilty gives evidence of his inspection of the verandah at Aquastar's property in April 2015 when it was raining, including viewing it from the roof of the building. He considered it unsafe to step onto the verandah. He could see rusted iron on the guttering and roof and repairs "that hadn't worked." From the footpath below he could see that water was leaking from the roof cladding into the timber structure, rotting that structure and the soffits on the underside of the verandah. Some small pieces of soffit had fallen off. Water was pooling on the footpath below the verandah. He concluded that the roofing material was not weathertight and that the water on the footpath was caused by the state of disrepair of the verandah.

[35] Mr Quilty also gives evidence of an inspection in late June or early July 2015, again when it was raining but does not state any details of what he observed on that occasion.

[36] Ms Anapu affirms that she is employed by the Council as a Building Control Administrator and Quality Assurance Co-ordinator. She has worked for the Council for 22 years and in its Building Department for 10 years. She produces photographs of the Aquastar property taken on 19 August 2017, when it was raining. She saw water leaking from the visibly damaged areas of the soffit of the verandah to the footpath below. Her photographs show water damage to the verandah and water on the footpath below.

Evaluation

[37] I am satisfied on the evidence that the verandah at 55 Onslow Road is in a state that is not weather resistant and is collecting and discharging water to the footpath below



rather than to the piped street storm water system, contravening Rule C1.4.6(d) of the operative Kawerau District Plan. I do not accept the assertions made on behalf of Aquastar which purport to contradict that evidence.

[38] I am also satisfied from the evidence filed by the Council, as summarized above, and from the Court file recording alternative dispute resolution procedures and directions to provide evidence that Aquastar has been given ample opportunity to address this non-compliance and resolve both its appeal and the application for enforcement orders without the need for a decision to be made by the Court. It has not availed itself of those opportunities.

[39] The non-compliance with Rule C1.4.6(d) results in adverse effects on the environment, in particular the pedestrian environment on Onslow Street in Kawerau's central area, contrary to the objective and policy for the Commercial 1 zone. I am not aware of any countervailing reason why those plan provisions should not be upheld in the circumstances of this case.

[40] For those reasons, I dismiss the appeal by Aquastar against the abatement notice which the Council issued to it.

[41] The Court's power to make an enforcement order is set out in s 314 of the Act. The factual matrix and the Council's application do not raise any issue beyond considering whether the evidence demonstrates, on the part of Aquastar, a contravention of a rule in the Plan or the causing of an adverse effect on the environment which should be avoided, remedied or mitigated. Having made findings of both of those things on the evidence before me and in the exercise of the discretion conferred by s 319 of the Act, I also find that this is an appropriate case for making enforcement orders. I accordingly grant the Council's application for enforcement orders, being an order to cease contravening Rule C1.4.6 of the Plan, an order to take action to comply with that rule and an order to reimburse the Council for its actual and reasonable costs and expenses incurred in dealing with the effects of Aquastar's non-compliance with the rule and the abatement notice.

Orders

[42] The appeal by Aquastar Holdings Limited against the abatement notice issued on 12 July 2017 by the Kawerau District Council is dismissed.



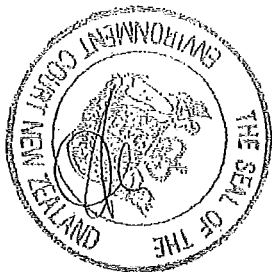
[43] The Court makes the following enforcement orders under sections 314(1)(a)(i), 314(1)(b)(i) and (ii), 314(1)(c), 314(d) and 314(1)(da) of the Resource Management Act 1991:

Aquastar Holdings Limited (**Aquastar**), in respect of the property at 55 Onslow Street, Kawerau, legally described as Lots 39, 40 and 41 DPS 6351 (the **Property**), is required to do the following:

- (a) Cease contravening Rule C1.4.6 Verandahs of the Operative Kawerau District Plan (the **Plan**); and
- (b) Take all necessary action to ensure the verandah at the Property complies with the Rule C1.4.6 of the Plan, including by:
 - (1) Providing the Kawerau District Council with a report from a suitability qualified engineer as to the integrity and weathertightness of the verandah at the Property against the requirements of Rule C1.4.6 of the Plan and setting out the remedial action required to ensure compliance with Rule C1.4.6 of the Plan;
 - (2) Undertaking the remedial action detailed in that above-mentioned report to the extent necessary to ensure compliance with Rule C1.4.6 of the Plan;

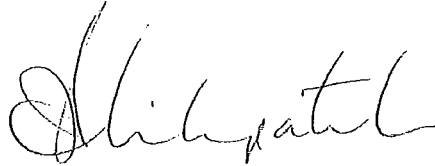
and

 - (3) Undertaking any other action the Court considers necessary to ensure compliance with Rule C1.4.6 of the Plan and to avoid, remedy or mitigate the adverse effects on the environment resulting from Aquastar's non-compliance with Rule C1.4.6 of the Plan; and
- (c) Reimburse the Kawerau District Council for the actual and reasonable costs and expenses which the Kawerau District Council has incurred and incurs in avoiding, remedying or mitigating any adverse effect on the environment as a result of Aquastar's non-compliance with Rule C1.4.6 of the Plan and the abatement notice dated 12 July 2017 and associated provisions of the Act.

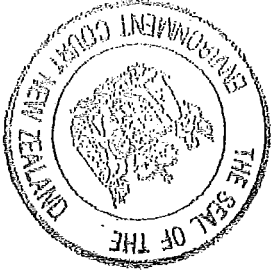


[44] Costs in these proceedings are reserved. If the Council wishes to seek costs, it must provide its memorandum and any evidence in support within 20 working days of the

date of issue of this decision. Any response by Aquastar must be filed within 10 working days of receipt of the Council's memorandum and evidence. If any reply is necessary, the Council may file that within 5 working days of Aquastar's response.



D A Kirkpatrick
Environment Judge



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

Decision No. [2018] NZEnvC 185

IN THE MATTER of the Resource Management Act 1991
AND of an application for consent under s 315
of the Act
BETWEEN KAWERAU DISTRICT COUNCIL
(ENV-2018-AKL-000257)
Applicant
AND AQUASTAR HOLDINGS LIMITED
Respondent

Court: Environment Judge DA Kirkpatrick sitting alone under ss 279 and
309(1) of the Act
Hearing: On the papers
Date of Decision: 28 September 2018
Date of Issue: 28 SEPTEMBER 2018

DECISION OF THE ENVIRONMENT COURT ON REQUEST FOR CONSENT

- A. The Environment Court grants consent to the Kawerau District Council so that the Council may:
1. comply with any of enforcement order B(b) as made by the Court in its decision in this proceeding dated 15 June 2018 and, for this purpose, enter upon the property at 55 Onslow Street, Kawerau and enter any structure on that property;



2. sell or otherwise dispose of any structure or materials salvaged in complying with the orders in accordance with (1) above; and
3. after allowing for moneys received under (2) above, if any, recover the costs and expenses of doing so as a debt due from the respondents.

REASONS

[1] In the Court's substantive decision in this proceeding,¹ Aquastar Holding Limited's (**Aquastar**) appeal against an abatement notice issued to it by the Council was dismissed and enforcement orders generally as sought by the Council against Aquastar were made as follows:

B: The Court makes the following enforcement orders under sections 314(1)(a)(i), 314(1)(b)(i) and (ii), 314(1)(c), 314(d) and 314(1)(da) of the Resource Management Act 1991:

Aquastar Holdings Limited (**Aquastar**), in respect of the property at 55 Onslow Street, Kawerau, legally described as Lots 39, 40 and 41 DPS 6351 (the **Property**), is required to do the following:

- (a) Cease contravening Rule C1.4.6 Verandahs of the Operative Kawerau District Plan (the **Plan**); and
- (b) Take all necessary action to ensure the verandah at the Property complies with the Rule C1.4.6 of the Plan, including by:
 - (1) Within one month of the date of these orders, providing the Kawerau District Council with a report from a suitability qualified engineer as to the integrity and weathertightness of the verandah at the Property against the requirements of Rule C1.4.6 of the Plan and setting out the remedial action required to ensure compliance with Rule C1.4.6 of the Plan;
 - (2) Within two months of the date of these orders, undertaking the remedial action detailed in that above-mentioned report to the



¹ *Aquastar Holdings Limited v Kawerau District Council* [2018] NZEnvC 091

extent necessary to ensure compliance with Rule C1.4.6 of the Plan;

and

- (3) Undertaking any other action the Court considers reasonably necessary to ensure compliance with Rule C1.4.6 of the Plan and to avoid, remedy or mitigate the adverse effects on the environment resulting from Aquastar's non-compliance with Rule C1.4.6 of the Plan; and
- (c) Reimburse the Kawerau District Council for the actual and reasonable costs and expenses which the Kawerau District Council has incurred and incurs in avoiding, remedying or mitigating any adverse effect on the environment as a result of Aquastar's non-compliance with Rule C1.4.6 of the Plan, the abatement notice dated 12 July 2017 and associated provisions, including ss 9 and 323, of the Act.

[2] On 18 September 2018 the Council sought consent under s 315(2) of the Act to allow it to comply with the enforcement orders on behalf of Aquastar should it fail to do so.

[3] The full text of s 315 provides:

315 Compliance with enforcement order

- (1) Where an enforcement order is made against a person, and that enforcement order is served on that person, that person shall—
- Comply with the order; and
 - Unless the order directs otherwise, pay all the costs and expenses of complying with the order.
- (2) If a person against whom an enforcement order is made fails to comply with the order, any person may, with the consent of the Environment Court,—
- Comply with the order on behalf of the person who fails to comply with the order, and for this purpose, enter upon any land or enter any structure (with a constable if the structure is a dwellinghouse); and
 - Sell or otherwise dispose of any structure or materials salvaged in complying with the order; and
 - After allowing for any moneys received under paragraph (b), if any, recover the costs and expenses of doing so as a debt due from that person.
- (3) Any costs or expenses which remain unpaid under subsection (2)(c) may be registered under the Statutory Land Charges Registration Act 1928 as a charge on any land in respect of which an enforcement order is made.
- (4) Failure to comply with an enforcement order is an offence under section 338.



[4] In this case there was communication between Aquastar and the Council about compliance with the enforcement orders. The Council advised that it was content for its application for consent to be put on hold until 26 September 2018 to give Aquastar

an opportunity to complete the works by 25 September 2018 as it has advised it intends to do.

[5] The Council is to be commended for affording Aquastar this opportunity, notwithstanding that the history of this proceeding (as set out in the substantive decision) might indicate a regrettable tendency on Aquastar's part to fail to meet its own timeframes.

[6] As it transpires, Aquastar has again failed to do what it said it would. In its reporting memorandum dated 26 September 2018, counsel for the Council advised that while some work had been done, the Council's building control officer inspected the property on 25 September 2018 and found that work to be insufficient to comply with Rule C1.4.6 of the District plan. An unsworn affidavit in the name of the officer was filed with that memorandum. The Council now seeks consent in terms of its application.

[7] Also on 25 September 2018, the principals of Aquastar wrote to the Council's solicitors, with a copy to the Court, setting out the basis on which they had engaged a builder and enclosing photographs of the work carried out. Today Aquastar filed a memorandum referring to the unsworn affidavit and advising that the issues identified in that affidavit had been referred to the builder who would be returning to the job to make further repairs. Aquastar views the errors in the earlier work as being marginal. Whatever the degree of error may be, I take this to be, effectively, acknowledgement that the work has not been completed.

[8] On the basis of this material, I conclude that Aquastar has failed to comply with the order. I acknowledge that the further work required may not be great, but the real issue is that notwithstanding the time it has been afforded to fix the problem, Aquastar has not undertaken the repair work required. I also acknowledge that it may yet be possible for Aquastar to complete the work. There is nothing in the granting of consent under s 315(2) that forbids a person against whom an enforcement order has been made from continuing to try and comply with that order. There is also nothing that prevents the parties from dealing directly with each other to resolve any remaining issues. The purpose of the provision is to allow the enforcement agency or other person to whom the order has been granted to step in. It is a measure to promote progress towards compliance with the relevant plan and the Act and is a method of achieving finality in enforcement proceedings.



[9] Given the information before the Court and the history of this proceeding, I am satisfied that it is appropriate to grant consent to the Council to comply with the orders made in this proceeding on Aquastar's behalf. This matter has gone on too long. Even if Aquastar has the best of intentions about completing the work, the Council should have, as a backstop, the ability to step in and finish the job and recover its costs in doing so.

[10] The relevant enforcement order for this purpose is in B(b), as set out in paragraph [1] above, as the orders in B(a) and B(c) are not able to be done by someone other than Aquastar. Consent is granted accordingly to the Council to comply with that order in terms of s 315(2) of the Act, as set out at the commencement of this decision.



A handwritten signature in black ink, which appears to read "D A Kirkpatrick".

D A Kirkpatrick
Environment Judge