

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

Decision No. [2018] NZEnvC 200

UNDER the Resource Management Act 1991
AND
IN THE MATTER of an application for *ex parte* interim
enforcement orders under s 320 of the Act

BETWEEN KAWAU ISLAND ACTION
INCORPORATED SOCIETY
Applicant

(ENV-2018-AKL-000274)

AND ROD and PATRICIA DUKE
First Respondents

AND AUCKLAND COUNCIL
Second Respondent

Court: Environment Judge D A Kirkpatrick,
sitting alone under ss 279(1)(d), 309(2) and 320 of the Act

Date: 11 October 2018

DECISION ON *EX PARTE* APPLICATION FOR
INTERIM ENFORCEMENT ORDERS

- A. The Court refuses to make any interim enforcement orders.
- B. Directions made for service and statements of position.
- C. Costs reserved.



REASONS

Introduction

[1] This is an application dated 11 October 2018 by Herc Ross Coleman acting for Kawau Island Action Incorporated Society (KIA) (**Applicant**) for interim or full enforcement orders in relation to the construction of a helicopter boatshed at 75 Sarsfield Street, Herne Bay, Auckland by the First Respondents, Rod and Patricia Duke. The application has been made on an *ex parte* basis, although the Applicant advises that the Dukes are to be given notice.

[2] Essentially, the Applicant says that the helicopter boatshed is being constructed in a manner that does not comply with the resource consent granted for it: in particular, instead of reusing the wooden columns and framing of the existing boatshed, those elements are being or have been replaced by metal elements.

[3] As set out in the application but with some light editing, the orders sought are framed as follows:

- (a) Require the First Respondents Rod and Patricia Duke to immediately stop work on the construction of a helicopter boatshed at 75 Sarsfield Street as it contravenes either resource consent CST60082316 or the rules in the Plan Coastal;
- (b) Remove the unconsented exposed steel frames from the boatshed and restore the wooden piles that are shown in the resource consent plans RC 02 and RC 03 and required by the Plan Coastal;
- (c) In the likely event of (b) above not being achieved or unachievable demolish the partly built structure, and, if starting again, use the consented materials;
- (d) Require the Auckland Council to issue a notice to fix for (b) above, to be complied with and to set monitoring conditions so no further unconsented activity occurs;
- (e) Alternatively and at the Court's discretion require the Dukes to apply for a publicly notified variation of consent CST60082316 to allow for the use of



exposed steel frames instead of timber piles;

- (f) Require the Auckland Council to revoke the Construction Management Plan issued by Kylie Robertson as it certifies unconsented work done to excavate the old concrete foundations and put new foundations for the steel frames;
- (g) Issue a notice to the Dukes to obtain a building consent for reconstruction of the smaller shed 38448 next door.

[4] The application is made on the following terms and conditions:

- (a) That no administration charges or the like should be payable as the helicopter boatshed is a matter of intense public interest having featured on the front page of the Herald. Moreover the evidence is so strong a prima facie case for an enforcement order exists.
- (b) The order shall require the restoration of the physical state of the boatshed to what it was before the approved piles were removed.
- (c) If an interim order is not granted then steps be put in place to quickly proceed to a hearing so further harm to the environment does not occur.

[5] The application is supported by an affidavit of Mr Coleman sworn on 10 October 2018. Annexed to the affidavit as exhibits are:

- (a) a copy of the Auckland Council's decision dated 18 August 2017 in respect of applications numbered LUC60112250 and CST60082316 relating to a proposal to alter an existing boatshed by adding new cladding and sliding section to house a helicopter landing pad and to use the structure for associated purposes;
- (b) a copy of page 12-3 of the Auckland Unitary Plan (AUP) which includes part of permitted activity rule 12.5.1;
- (c) 9 photographs apparently showing the old shed with wooden piles;



- (d) 2 photographs showing the partly built new shed with steel frames;
- (e) 2 pages of building consent plans depicting steel frames;
- (f) The cover page of the building consent plans showing concrete foundations and steel frames;
- (g) A copy of a construction management plan for the new boatshed dated 6 March 2018;
- (h) A copy of a letter from Auckland Council to Don Mathieson dated 20 September 2018 refusing a request under the Local Government Official Information and Meetings Act 1987 for copies of "council authorized variations granted in relation to discrepancies between the resource and building consents" at 75-77 and 79 Sarsfield St on the basis that the information requested does not exist.
- (i) A copy of a letter from Auckland Council to Herc Coleman dated 9 October 2018 in response to a request under the Local Government Official Information and Meetings Act 1987 partly providing information regarding the approval of the Construction Management Plan and the replacement of piles and partly refusing a request for an assessment of substitution of steel for wooden piles as a permitted activity on the basis that the information requested does not exist.
- (j) A number of pages of e-mail correspondence in relation to the 75 Sarsfield Street Boat Shed.
- (k) A copy of the planning report and statutory assessment for the application by Paul Arnesen dated 4 August 2016.

[6] Also accompanying the application is a memorandum of the Applicant stating the enforcement order is sought *ex parte* on the basis:

- (a) That the longer works continues, the bigger the mess that will need to be cleaned up after the steel frames are removed; and



- (b) If a variation of the consent is needed it will be prudent to stop work until that issue is decided.
- (c) As a postscript, the Applicant advised that the First Respondent, the Dukes, were being given notice.

[7] There is no undertaking as to damages. As noted above, one of the terms and conditions of the application is that "no administration charges or the like should be payable" on the basis of the public interest and a strong *prima facie* case.

Grounds for Enforcement Orders

[8] The application does not specify the particular statutory provisions under which it is made. It would appear that the orders sought as recounted in [3](a), (b) and (c) above may be sought:

- (a) under s 314(1)(a)(i) to require the Dukes to cease, or to prohibit them from commencing, anything done or to be done that contravenes or is likely to contravene a rule in the AUP (Regional Coast Plan) (being the permitted activity rule in relation to replacement of structures) or a resource consent; and
- (b) under s 314(1)(b)(i) to require the Dukes to do something necessary to ensure compliance with a rule in the AUP (Regional Coastal Plan) or the resource consent.

[9] On a preliminary basis, I note that there appear to be jurisdictional issues with the other orders sought:

- (a) Order (d) would require the Council to issue a notice to fix. This is presumably a notice to fix under the Building Act 2004. Enforcement of that Act is not a matter within this Court's jurisdiction.
- (b) Similarly, order (g) would require the Dukes to obtain a building consent in relation to another shed and is also beyond this Court's jurisdiction.
- (c) Order (e), sought on an alternative basis, would require the Dukes to make



an application to vary the existing coastal permit CST 60082316. It is not clear that this Court has the power to order any person to make an application for resource consent or to vary an existing resource consent. It may be that a consequence of an order to cease doing something that is not in compliance with a resource consent would be the making of such an application, but that is materially different to requiring a person to apply.

- (d) Order (f) would require the Council to revoke the construction management plan on the ground that it certifies unconsented work. It is not apparent that this plan constitutes any kind of certification: certainly it cannot amount to any kind of resource consent on its own.

Making an *ex parte* interim enforcement order

[10] This Court's authority to make an interim enforcement order is conferred by s 320 of the Act, which states:

320 Interim enforcement order

- (1) Except as provided in this section, the provisions of sections 314 to 319 apply to the application for, and determination of, an interim enforcement order.
- (2) If an Environment Judge or a District Court Judge considers it necessary to do so, the Judge may make an interim enforcement order—
 - (a) without requiring service of notice in accordance with section 317; and
 - (b) without holding a hearing.
- (3) Before making an interim enforcement order, the Environment Judge or the District Court Judge shall consider—
 - (a) what the effect of not making the order would be on the environment; and
 - (b) whether the applicant has given an appropriate undertaking as to damages; and
 - (c) whether the Judge should hear the applicant or any person against whom the interim order is sought; and
 - (d) such other matters as the Judge thinks fit.
- (4) The Judge shall direct the applicant or another person to serve a copy of the interim enforcement order on the person against whom the order is made; and the order shall take effect from when it is served or such later date as the order directs.
- (5) A person against whom an interim enforcement order has been made and who was not heard by a Judge before the order was made, may apply, as soon as practicable after the service of the order, to an Environment Judge



or a District Court Judge to change or cancel the order; and, after hearing from the person against whom the interim enforcement order was made, the applicant, and any other person the Judge thinks fit, the Environment Judge or the District Court Judge may confirm, change, or cancel the interim enforcement order.

- (6) An interim enforcement order stays in force until an application for an enforcement order under section 316 is determined, or until cancelled by an Environment Judge or a District Court Judge under subsection (5), or cancelled by the Environment Court under section 321.

Evaluation

[11] From the material before me, I am not satisfied that it is necessary to make an interim enforcement order, especially not on an *ex parte* basis. The main issue raised in the application concerns an amendment to the plans to use steel columns and frames to support the structure, rather than the existing wooden elements. There appears to be an arguable issue whether that change is within the scope of a permitted activity rule. Even if it is not, and however obvious the differences between the materials and the shapes may be, there is little more in support of the application than the Applicant's assertion that metal elements will be more dangerous than wooden elements to people walking, swimming or kayaking in the vicinity.

[12] There is no evidence before me to indicate any actual or likely effect on the environment that requires urgent intervention. If it is the case that the Dukes have constructed the boatshed otherwise than in accordance with the resource consents, then that can be addressed after following a process that allows evidence to be prepared and exchanged and after a full hearing.

[13] In relation to the giving of an undertaking as to damages, it is reasonably well settled¹ that an undertaking as to damages may not be necessary where the applicant is:

- (a) protecting public, rather than private, interests;
- (b) a consent authority performing a regulatory role; or
- (c) unquestionably financially capable of meeting any award of damages.

¹ *Dunedin City Council v Saddle Views Estate Ltd* [2015] NZEnvC 24 at [15]; *Palmerston North City Council v Golf City Developments Ltd* [2014] NZEnvC 264 at [11]; *Waikato Regional Council v Cox A045/98* (EnvCt); *Auckland Council v Chen Hong Co Ltd* [2016] NZEnvC 171 at [9-10]; and *Auckland Council v Mao* [2016] NZEnvC 188 at [13].



[14] While the Applicant may claim to be protecting public rather than private interests, I am not satisfied that its interest in this proceeding is such that it should be relieved of the requirement to guard against the risk that an order may be made on its application that is ultimately overturned and that causes loss to another party.

[15] In relation to whether it is necessary for the Respondents to be served with notice of the application or for a hearing to be held, I am satisfied that it is. The Dukes are entitled to an opportunity to respond to the issues raised and to present evidence. The Council is entitled to respond to the complaints about its administration, monitoring and enforcement of the consents. It will assist the Court for the Council to be present and able to advise on its approach to the consenting issues relating to the change of materials for the boatshed.

[16] I am also aware that there are presently judicial review proceedings before the High Court at Auckland by this Applicant against the same Respondents. From information given to me by the Registrar, it appears that a hearing is set down for 18 October 2019. I do not know anything about the substance of those proceedings, but I am concerned to ensure that a proceeding in this Court does not trespass on a proceeding before the High Court. The Applicant has put nothing about this High Court proceedings in its papers, contrary to the obligation of candour on an applicant for *ex parte* relief.

[17] For those reasons, within the discretion conferred by s 319 of the Act and in consideration of the relevant matters set out in ss 314 to 319 of the Act, under s 320 of the Act I refuse to make the *ex parte* interim enforcement orders sought by the Applicant against the Respondents.

[18] I **direct** the Applicant to serve both Respondents forthwith with its application and supporting documents and a copy of this decision.

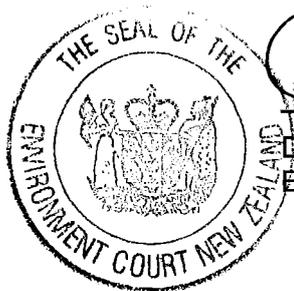
[19] I **direct** the Respondents to notify the Court within 10 working days of service of the application on them of the position each takes in response to the application.

[20] The Court will then convene a conference (likely by telephone) to discuss how best to make progress to resolve this application and make any appropriate timetabling arrangements.



[21] Costs are reserved.

For the Court:



D A Kirkpatrick

D A Kirkpatrick
Environment Judge