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

Decision No. [2018] NZEnvC 247

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders under s 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 279 of the Act
Hearing:	In Chambers
Date of Decision:	20 December 2018
Date of Issue:	20 December 2018

COSTS DECISION OF THE ENVIRONMENT COURT ON ENFORCEMENT ORDER APPLICATION

A: Costs awarded $23,505

REASONS

Introduction

On 20 August 2018 the Court made enforcement orders on the application of

Gisborne District Council (the Council) against Dylan O'Connell and Christine Anne de Cent (jointly the Respondents).

[2] In summary, the orders required the Respondents to remove motor vehicles (commonly derelict) together with associated machinery and parts from the road reserve within 100 metres of a property situated at 143 Seddon Street, Patutahi, near Gisborne (the Property) and to cease using the road reserve and Property for the storage of such items and operation of a wrecker's business.

[3] As part of the decision to issue enforcement orders I reserved costs in favour of the Council which now seeks an award against both Respondents.

Background

[4] Ms de Cent is the owner of the Property. According to the information provided by the Council to the Court, Mr O'Connell is the partner of Ms de Cent's daughter.

[5] Patutahi is a small rural settlement approximately 15 km outside Gisborne City. The Property is one of eight residential properties situated at Seddon Street and is zoned General Residential in the District Plan.

[6] The Council provided affidavits in support of its enforcement order application from seven witnesses. One of those witnesses was Mr S M Dobbie, a Monitoring and Compliance Officer employed by the Council. Mr Dobbie deposed that the Council had received at least 27 complaints over the years from members of the public relating to activities undertaken on the Property and the adjoining road reserve. The complaints contended that anywhere up to 15 or 20 derelict vehicles might be found on either the Property or the road reserve at any given time. A consistent theme of the complaints was use of the road reserve for the storage of derelict vehicles, vehicle parts, engines, tyres and the like. Complainants contended that a car wrecking business was operating between the two areas.

[7] Between 2 July 2014 and 26 April 2018, Mr Dobbie and other Council officers undertook somewhere in the order of 38 observations and/or inspections of the Property and the road reserve, confirming the veracity of the complaints which had been made. Mr Dobbie's affidavit included a series of photographs supporting

the officers' observations.

[8] Mr Dobbie's affidavit described numerous interchanges between Council officers and the Respondents requiring the activities to cease, all of which proved to be fruitless. The Council had served parking infringement notices, resource management infringement notices and an abatement notice on Mr O'Connell, who had 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.

[9] Other affidavits provided by the Council confirmed the information contained in Mr Dobbie's affidavit, including that of abusive and threatening conduct.

[10] The Council provided information about the taking of soil samples from the road reserve and the testing of those samples to establish the seepage of oil onto the road reserve.

[11] An affidavit from Mr R F Proffit, the Council's Consents Manager, established that the activities undertaken by the Respondents on the Property and the road reserve constituted discretionary activities under the District Plan for which a resource consent was required and that no resource consent authorising the activities was held by either of the Respondents.

[12] I was satisfied that the activities undertaken or allowed to be taken by the Respondents on the Property and the adjacent road reserve were activities which required a resource consent and, further, were noxious, dangerous, offensive or objectionable to such an extent as to have an adverse effect on the environment. I was satisfied that the grounds for making an enforcement order set out in ss 314(1)(a)(i), 314(1)(a)(ii), 314(1)(b)(i), 314(1)(b)(ii) and 314(1)(c) RMA had been made out allowing the Court to make enforcement orders accordingly.

[13] I also found it appropriate 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 had described should the Respondents fail to do so. Further, I determined that it was necessary for me to make an order pursuant to s 315(2) allowing the Council to give effect to the orders

should the need arise 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.

The Council application

[14] The Council seeks an award of the legal costs which it incurred in relation to the enforcement order application totaling $23,505.00 (excluding GST). Invoices for these costs were annexed to the application. The Council application did not include a claim for reimbursement of time spent by Council staff. Costs were sought on an indemnity basis.

[15] Paragraph 7 to 11 of the Council's costs submissions referred to the general principles applicable to costs awards in the Environment Court and noted the discretionary nature of the Court's powers in that regard.

[16] The Council went on to identify a number of specific aspects of the Respondents' (more particularly Mr O'Connell's) behaviour, which it said warranted exercise of the Court's discretion in its favour. These might be summarised as:

- The Respondents' failure to explore reasonably available options for settlement. In that regard the Council referred to the long history of unsuccessful attempts to get the Respondents to comply with their obligations, including Mr O'Connell being spoken to on at least 20 occasions regarding the situation, the issue of various infringement notices and an abatement notice, as well as correspondence from the Council lawyer.
- The Council referred to threatening responses from Mr O'Connell and temporary "falling into line" before reverting to the previous status quo;
- The Council said it had exhausted all other options;
- The Council referred to the Respondents' refusal to meaningfully engage with it during the course of the enforcement proceedings. Although Ms de Cent provided a letter saying "we do not oppose making of the enforcement orders" no such advice was received from Mr O'Connell. Ms de Cent signed a joint consent memorandum in support of making enforcement orders but Mr O'Connell refused to do so.

[17] The Council identified the following factors as making it reasonable that

costs should be awarded on an indemnity basis:

- The unopposed evidence of the Council was that there was an ongoing breach of RMA by the Respondents over a four-year period that directly affected the amenity values of the surrounding neighbourhood;
- The Respondents had countless opportunities to remove vehicles from the Property and road reserve without the Council having to take court action;
- The unopposed evidence of the Council was that the storage of vehicles in poor repair and vehicle parts had resulted in the discharge of contaminants onto the road reserve;
- Mr O'Connell's abusive and threatening behaviour meant that seeking formal orders was necessary from both compliance and officer safety perspectives;
- The storage of the vehicles was associated with Mr O'Connell's commercial activities;
- The unlawful activities of the Respondents had resulted in the Council incurring legal costs that were solely attributable to those activities;
- In May 2017 the Respondents were put on notice that the Council would seek its full costs if making an enforcement order application was required;

The Respondents reply

[18] Mr O'Connell made no written response to the application. Ms de Cent sent the Court an email, dated 15 November 2018, disputing that costs should be awarded. The email is a little difficult to interpret but appeared to make the following points:

- It contended that the Property and road reserve had been cleared up by 30 June 2018 so that there was no need for further action to be taken;
- It suggested that Mr O'Connell was paying off a number of fines through the Court which would incorporate payment of the infringement order penalties;
- It contended that instead of going through the Courts the Council should have gone to the local police officer to have the Property cleaned up;
- It contended that the Property now looks "really good".

Discussion

[19] The Court's power to award costs on any proceedings is found in s 285 RMA which relevantly provides:

> **285 Awarding costs**
>
> (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable.

[20] Section 285 gives the Court a wide power to award such costs as it considers reasonable. Notwithstanding the wide discretionary power contained in s 285, it is recognised that costs must be awarded on a principled basis and should not be awarded to punish litigants. The purpose of costs awards is to compensate parties to proceedings where that is just.

[21] It is common practice for costs to be awarded in enforcement order proceedings. That is on the basis that if a party puts a local authority to the cost and expense of having to obtain an enforcement order from the Environment Court to compel that person to meet their environmental obligations, it is entirely appropriate that the person subject to the order should contribute to the local authority's costs of obtaining it. That is clearly the case in this instance.

[22] Further, I am satisfied that the various factors which the Council set out in para [17] (above) lead inevitably to the conclusion that the costs award should be an indemnity award in this case. It is apparent from the information provided by the Council that its officers had made many attempts over a period of years to have the Respondents comply with their obligations, remove vehicles and related items from the road reserve and cease the vehicle wrecking business or activity on the Property and road reserve. These attempts were fruitless. Occasionally there would be a temporary improvement, but things would shortly slip back into the way they were previously. The Council made somewhere in the order of 38 visits to the Property in attempts to get the Respondents to comply with their obligations and yet was put into a situation where it had to apply to the Court for enforcement orders.

[23] A particular aspect of the proceedings is the threatening and aggressive actions of Mr O'Connell to Council staff. It seems to be implicitly acknowledged in Ms de Cent's email of 15 November 2018 that there were abusive situations. It is

not the function of a costs award to punish respondents for their actions, however in a situation where their officers are being abused local authorities have no alternative but to take enforcement action rather than endeavouring to resolve a situation by discussion, as a matter of staff safety if nothing else.

[24] These enforcement orders were made in a situation where the Respondents have not endeavoured to contradict the Council's assertions as to the nature of the activity undertaken on the road reserve, the lengthy period over which their activities were undertaken, the unsightly situation which was the subject of numerous complaints to the Council, the pollution of soil by oil products and the abusive approach taken by Mr O'Connell. I consider that having regard to those factors, it is inevitable that an indemnity costs award should be made against the Respondents.

Outcome

[25] The Respondents, Dylan O'Connell and Christine Anne de Cent, are hereby ordered jointly and severally to pay to Gisborne District Council the sum of $23,505.00 in reimbursement of costs incurred by the Council. This costs award to be enforced in the District Court at Gisborne if necessary.

B P Dwyer
Environment Judge