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

Decision No. [2019] NZEnvC 11

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders under s 314 of the Act
BETWEEN	TARARUA DISTRICT COUNCIL
	(ENV-2018-WLG-000031)
	Applicant
AND	CAPITAL ALL SIGNS HOLDINGS LIMITED
	First Respondent
AND	DARREN DAVID EASTON
	Second Respondent

Court: Environment Judge B P Dwyer sitting alone under s 279 of the Act
Date of Decision: 31 January 2019
Date of Issue: 31 January 2019

COSTS DECISION OF THE ENVIRONMENT COURT

A: Costs awarded

REASONS

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] On 27 July 2018 I gave an oral decision[1] on the application of Tararua District Council (the Council) making enforcement orders against Capital All Signs Holdings Limited (Capital) and Darren David Easton (jointly - the Respondents) ordering them to cease using a property at 23 Fraser-Collin Crescent, Dannevirke (the Property) for the storage of shipping containers and to remove the containers from the Property.

[2] In making the decision I reserved costs in favour of the Council which now seeks a costs award against both Respondents. The Respondents opposed the making of such an award.

Background

[3] Capital is the registered proprietor of the Property and Mr Easton is its sole director.

[4] In late June 2017 the Council received complaints about a number of aspects of activities on the Property, including the stacking of shipping containers on it. A Council officer conducted site visits to the Property to check the complaints on 10 and 11 July 2017 and observed a number of shipping containers in situ.

[5] On 17 July 2017 the Council wrote to the Respondents recording that use of the Property for the storage of shipping containers was not a permitted activity under the Tararua District Plan (the District Plan). A number of interactions took place between Council officers and the Respondents thereafter but the containers were not removed. On 4 September 2017 the Council served an abatement notice on Mr Easton requiring him to remove the containers.

[6] It seems that some containers on the Property may have been removed following service of the notice, however inspections of the Property on 15 November 2017, 21 December 2017, 31 January 2018 and 4 July 2018 established that as of those dates there were up to 12 containers remaining on the Property.

[7] I heard the Council's application for an enforcement order in Palmerston

[1] [2018] NZEnvC 123 (written version, 2 August 2018).

North on 27 July 2018. The Respondents were not represented by counsel (notwithstanding very clear advice from the Court) but Mr Easton appeared personally for both. I gave an oral decision on that date and found (inter alia):

> [17] I am satisfied that the storage on the Property of containers by the Respondents contravenes Rule 4.2.5.1(a) of the District Plan and s 9(3) RMA as it is an activity which requires a resource consent to allow it and no such consent is held by the Respondents. I accordingly determine that it is appropriate for me to make an order pursuant to s 314(1)(a)(i) requiring the Respondents to cease the activity.
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> [18] I am further satisfied that it is necessary for me to make an order pursuant to s 314(1)(b)(i) RMA requiring the Respondents to remove all containers from the Property to ensure compliance by them with the Act and Rule. The reason I am satisfied that it is necessary for me to make the order is that the Respondents have failed to comply with written requests from the Council to remove the containers and have further failed to comply with abatement notices requiring them to do so. I record that at the hearing this morning Mr Easton advised the Court that he would remove the containers but in light of his past failures to do so, I consider that it is necessary for an order to be made.

[8] I made enforcement orders accordingly.

The Council costs application

[9] The Council sought to recover its actual and reasonable legal costs totaling $37,385.32. Full details justifying the quantum were included in the Council application. The Council did not seek to recover the time expended by its officers in relation to the proceedings.

[10] The Council costs application referred to general principles applicable to costs award in the Environment Court and the basis on which indemnity costs were sought.

[11] The Council submitted that it was just and reasonable to order the Respondents to pay the Council's costs in making the application for enforcement orders on the basis that if they were not paid by the Respondents the cost would fall on its ratepayers.

[12] The Council application identified the following factors as supporting an award of indemnity costs:

- The Council contended that the Respondents had ample opportunity to avoid the proceedings. It referred to written advice given by the Council's CEO to Mr Easton on 17 July 2017 advising that the storage of shipping containers was not permitted and to the abatement notice which was subsequently served on Mr Easton and ignored;
- The Respondents failed to comply with Court directions requiring them to file a memorandum by 12 April 2018 outlining steps taken to negotiate or mediate;
- The Respondents failed to engage with the Council following the filing of proceedings so that a full hearing of the application was necessary. There was no narrowing of issues prior to hearing due to the Respondents' failure to engage;
- The evidence filed by the Council demonstrated that the storage of shipping containers was in breach of the rules of the District Plan as contended by the Council and the Respondents did not file any evidence to rebut that proposition;
- Mr Easton advised at the hearing on 27 July 2018 that he would willingly remove the containers. If he had advised the Council earlier as to his willingness to do so and/or had removed the containers voluntarily there would have been no need to incur the costs of the application and the hearing.

Mr Easton's response

[13] As was the case with the hearing on the merits, the Respondents were not represented by counsel on the costs application. However Mr Easton filed a reply on behalf of both to the application.

[14] It is difficult to coherently summarise the contentions made in the reply. The reply commenced by raising an issue regarding service of documents. It went on to refer to removal of a garden structure and earthworks which the Council had sought to be done in the course of its dealings with the Respondents. These two matters were of no relevance to the enforcement order proceedings in respect of the containers.

[15] Mr Easton advised that he had no money to pay the amount sought by Council and that he invested all that he could on the failed venture. He is not able to work and is a beneficiary.

[16] The reply contended that there had been unhelpful dealings with Environment Court Registry staff. It contained a promise to endeavor to remove the containers and requested more time in which to sell or dispose of them.

[17] The reply did not otherwise address the issues raised in the Council costs application.

Outcome

[18] The Court's power to award costs 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.

[19] Section 285 gives the Court a wide power to award costs when it considers it "reasonable" to do so. Notwithstanding the wide discretionary power, it is well recognised that costs must be awarded on a principled basis and should not be awarded to punish litigants or those who bring actions before the Court. The purpose of a costs award is to compensate parties to proceedings where that is just.

[20] Although each case must be viewed on its merits, it is also well recognised that costs are highly likely to be awarded against unsuccessful parties in enforcement proceedings. That is because such proceedings are of considerable consequence and commonly involve local authorities having to take action to make parties comply with their environmental obligations.

[21] In this particular case the Court was satisfied that the storage of shipping containers on the Property was not a permitted activity under the District Plan. Neither was it approved by way of a resource consent granted to either of the Respondents. Under those circumstances, particularly when complaints regarding the containers had been made, the Council was obliged to take action to remedy the

situation. It initially endeavoured to do so by way of correspondence from its CEO to the Respondents and then by way of abatement notice. When neither of these two attempts to resolve the situation were successful the Council was left in a situation where it had to either ignore the obvious breach of District Plan rules or seek an enforcement order, which it did. In short, the Respondents left the Council in a situation where it had no option but to take these proceedings where it succeeded in obtaining an enforcement order.

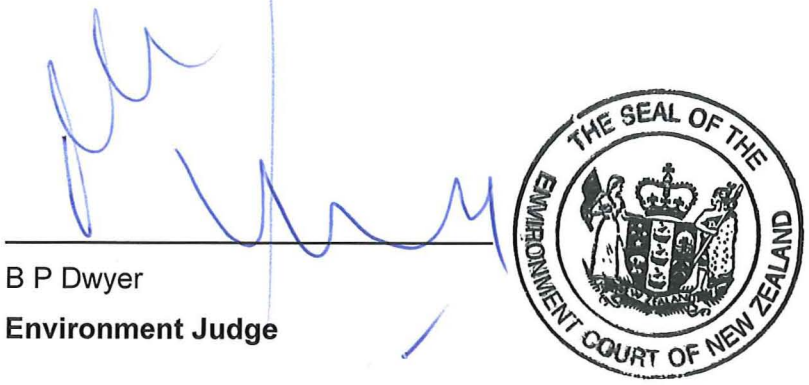
[22] I am satisfied that this is a situation where the Council is entitled to indemnity costs. The Respondents had every opportunity to remedy the situation by removing the containers in question. An alternative option would have been to seek resource consent to enable them to stay, however the Respondents did not take legal advice and may not have been aware of that option. Whatever the case is in that regard, I consider that having ignored the various Council requests and having failed to engage constructively in the Court process in a situation where there was clear breach of District Plan rules, the Respondents ought reimburse the Council in full for the costs which it incurred. If reimbursement is not made then the ratepayers of the District have to pay for making the Respondents undertake the actions which they could have done voluntarily.

[23] The Respondents advise that they are not in a financial situation to meet the payment of costs. They have provided insufficient information to satisfy me that is the case, although I understood that they own the containers in question and the land on which they were stored. In any event, the appropriate time to have regard to the matter of costs is at the commencement of proceedings rather than at their conclusion. It was open to the Respondents to have resolved the matter by removing the containers voluntarily as they volunteered to do at the Court hearing. Had they taken that action on the commencement of the enforcement process they would have avoided a good percentage of the costs which were incurred by the Council having to prepare for a full hearing.

[24] Having regard to all of those considerations and the various invoices provided in support of the Council costs application, I am satisfied that it is reasonable that the Respondents be ordered (jointly and severally) to reimburse the Council on an indemnity basis.

Outcome

[25] Capital All Signs Holdings Ltd and Darren David Easton are jointly and severally ordered to pay to Tararua District Council the sum of $31,777.52[2] in reimbursement of costs incurred by the Council. This costs award to be enforced if need be in the District Court at Dannevirke.



B P Dwyer
Environment Judge

[2] This is the amount Council applied for, minus 15% GST. See *Benson v Kapiti Coast District Council* [2016] NZEnvC 7, [2017] NZEnvC 14.