**BEFORE THE ENVIRONMENT COURT**
**AUCKLAND REGISTRY**

**I MUA I TE KŌTI TAIAO O AOTEAROA**
**KI TĀMAKI MAKAURAU**

**Decision No. [2020] NZEnvC 108**

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| | IN THE MATTER | of the Resource Management Act 1991 |
| | AND | of an appeal under s 325 of the Act |
| | BETWEEN | TERRA NZ GROUP LIMITED |
| | | (ENV-2019-AKL-000313) |
| | | Appellant |
| | AND | AUCKLAND COUNCIL |
| | | Respondent |

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| Court: | Environment Judge D A Kirkpatrick – sitting alone under s 279(1)(g) of the Act |
| Hearing: | On the papers |
| Date of Decision: | 22 July 2020 |
| Date of Issue: | 22 July 2020 |

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**DECISION ON COSTS**

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A: Application for costs refused.

**REASONS**

**What this case is about**

[1] This is a case concerning earthworks to form a road to serve a rural subdivision in Karaka, South Auckland. Issues arose as to whether the earthworks were within or outside the scope of a resource consent. Abatement notices were issued and then cancelled soon afterward, but there is still a dispute whether all of the earthworks were consented. That dispute is not before the Court, but it appears to be the foundation for a claim for costs by the Appellant against the Council on the cancellation of the

abatement notices.

**Background**

[2] On 19 August 2016, resource consent was granted by Auckland Council to Karaka Farms Limited to undertake an environmental lot subdivision at 55 Harkness Road, Karaka. Terra NZ Group Limited (the **Appellant**) was a consultant to the consent holder.

[3] For the purposes of this decision, the relevant part of the proposal was stated in the Council's decision as being:

> Approx. 2,300 $m^3$ of earthworks over an area of 2,600 $m^2$ to form approximately 440 metres of public road.

These earthworks required resource consent under the then operative District and Regional Plans and under the proposed Auckland Unitary Plan (**AUP**) because that area and volume of earthworks exceeded the permitted standards in those plans.

[4] The conditions attached to the resource consent referred to several plans and drawings, some of which were included. In particular, condition 6(c)(i) appeared to indicate a road formation width of 10 metres and a metalled carriageway width of 6 metres. These widths appear to be the same as those shown in a cross-section of the proposed road.

[5] At this point, with the benefit of hindsight, one may quickly calculate that the extent of the earthworks stated in the consent (2,600 $m^2$) was likely to be quite different from the amount actually involved in forming a length of 440 metres of road. In terms of the areal extent, a formation 10 metres wide by 440 metres long will involve works of 4,400 $m^2$. If one anticipates that the actual working area will extend further than the formation, then the discrepancy increases. The calculation of volume is not as straight-forward, but one might readily estimate that given an area of over 4,400 $m^2$, the figure of 2,300 $m^3$ in the consent would be low.

[6] It is not clear when the earthworks commenced. Counsel for the Appellant says the work had been proceeding for several months before the abatement notices were served on 18 November 2019. Ms L B Gertz, the Council's Compliance Monitoring Officer, says that concerns arose about the earthworks in late October 2019.

[7] The initial concerns of the Council were that:

(i) The earthworks exceeded the area of 2,600 m² authorised by Condition 1 of the resource consent; and

(ii) The culverts for the road exceeded the permitted activity standards, being longer than 30 metres and with erosion and sediment protection works in excess of 5 metres.

[8] The relevant rules under the AUP appear to be Rule E3.4.1(A33) in respect of culvert lengths and Rule E3.6.1.14 (b) in respect of the erosion and sediment protection works. These were the matters identified in the abatement notices issued on 18 November 2019. The abatement notices required the works to cease immediately.

[9] Abatement notices were issued to the following persons:

(a) Golden Shore Estate Limited, the owner of the land;

(b) Terra NZ Limited, the project manager; and

(c) Jesmond Contractors Limited, the contractor to do the works.

It does not appear that the holder of the relevant consent, Karaka Farms Ltd, was served.

[10] There was then communication between the Appellant and the Council. On 6 December 2019 the Appellant lodged an appeal against the abatement notice and applied for a stay of the abatement notice. A separate notice of appeal and application for a stay were lodged by Jesmond Contractors Ltd and Golden Shore Estate Ltd. It is pertinent to note here that the applications for a stay included reference to an intention to apply for a change or variation of the resource consent conditions by 12 December 2019.

[11] Reviewing the original application for resource consent, officers of the Council found further information had been provided under s 92 of the Act indicating that the maximum area of earthworks would be approximately 8,000 m², being 480 metres long and 60 metres wide, with a maximum volume of 2,300 m³. This information had apparently not been incorporated in the decision granting consent. Even so, the Appellant's own drawing dated 11 December 2019 of the consented earthworks overlaid with the proposed earthworks showed the consented area as being 6,450 m², with a further area 3,000 m² for which a new consent would be sought and an area of 1,100 m² of fill placed without resource consent which was to be removed.

[12] An initial judicial telephone conference was convened on 9 December 2019 at which it appeared that discussions among the parties might resolve matters and so the applications for stays were not pursued. On or about 12 December 2019 agreement was reached between the Appellant (for itself and on behalf of the other recipients of abatement notices) and the Council. That agreement is not before the Court but from the material that is available, it involved cancellation of the abatement notices, withdrawal of this appeal and an application for retrospective consent for the unconsented earthworks.

[13] It appears from Ms Gertze's affidavit that the process of considering that application an granting the new consent took some further time, but that does not affect the issue of costs on this appeal.

**Appellant's claim for costs**

[14] The Appellant now seeks costs in respect of legal costs and the filing fee on its appeal, totalling $23,208.58.

[15] The Appellant's claim is based on two grounds:

(a) That the abatement notice was issued unlawfully; and

(b) That the Appellant had advised the Council about this before the abatement notices were issued and so they were unnecessary.

[16] On the ground of unlawfulness, the Appellant submits that the abatement notice was erroneously based on the wrong quantum of earthworks, as particularised in the notice of appeal and set out briefly above.

[17] The Appellant also notes that it was neither the holder of the resource consent nor the person undertaking the works.

[18] On the ground that the appeal is unnecessary, the Appellant submits that the Council waited until after the appeal had been filed before taking steps to withdraw the abatement notice. In support of that ground, the Appellant submits:

(a) It responded urgently, arranging two site visits within a week of service of the abatement notice and entering into correspondence.

(b) It ceased work in accordance with the abatement notice, notwithstanding the clear error, which caused serious delays for the development.

(c) The first substantive response from the Council was not received until 5 December 2019.

(d) The Council acknowledged the earthworks of 2,600m² in the consented area could continue, notwithstanding that such earthworks were the basis for the abatement notice.

(e) The Appellant submits that the Council should, on realising its error, have withdrawn the abatement notice and reconsidered the position.

[19] The Appellant relies on the principle that one of the purposes of an award of costs is to compensate a person for expenditure unnecessarily incurred because of the actions of another party. In support, the Appellant submits that the following aggravating features are present in this case:

(a) The Council had the monitoring progress on the development for several months before it issued the abatement notice.

(b) The Council refused to engage with the Appellant to consider whether they had done an error in issuing the abatement notice.

(c) The requirement to cease work immediately has caused loss to the Appellant's client.

(d) The subsequent withdrawal of the abatement notice by the Council does not appear to be based on anything other than the information that should have been available to the Council at the time it issued the abatement notice.

[20] For those reasons, the Appellant submits that there should be an uplift in the quantum of costs that maybe awarded, to a significant or even full indemnity level because of these circumstances.

**Council's opposition**

[21] The Council opposes the application for costs. It says:

(a) It had sufficient grounds to issue the abatement notice.

(b) The abatement notice was cancelled after discussions between the parties and on the basis that the Appellant would apply under s127 of the RMA to

change or vary the conditions of the resource consent to allow unconsented works that had already occurred.

(c) The Appellant has not made such an application and so resiled from its agreement with the Council.

[22] The Council relies on a number of principles established by case law and referred to in this Court's Practice Note:

(a) Costs are not usually awarded against a Council unless it is found to have been demonstrably unreasonable or to have breached a duty.[1] This has been said to import an element of blame worthiness to the consideration of whether an award of costs should be made against a Council.[2]

(b) Rule 6.6(c) of the Court's Practice Note states that:

> If the decision appealed against would have imposed an unusual restriction on an Appellant's rights and the restriction is not upheld, costs may be awarded against the respondent Council.

The Council says that in this case, there were no unusual restrictions and it performed its duties responsibly and did not act unreasonably.

[23] The Council also refers to clause 6.6(d) of the Practice Note, which lists the factors that may be relied on in considering a substantial uplift to an award of costs and submits that none of those factors apply in this case.

[24] The Council submits that because the proceedings were withdrawn at a very early stage and there was no hearing, the Court cannot fully assess the merits of the cases because the relative strengths and weaknesses have not been challenged in a hearing. It would be an extreme case where costs were awarded.[3]

[25] In response to the grounds advanced by the Appellant, the Council says:

(a) That the abatement notice was not unlawful, as works had been done in breach of the resource consent. While the Council acknowledge that there was error in the amount of earthworks referred to the abatement notice,

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1 *Darroch v Northland Regional Council* (1993) 2NZRMA 637
2 *Emma Jane Limited v Christchurch City Council* Decision No. 020/09
3 *East Coast Conservation Society Inc. v Marlborough District Council* Decision No. A154/06 and *Trotter v Brain* [2015] NZEnvC 150 at [14]

resulting from the error in the text of the resource consent, there was still a breach in respect of the amount of earthworks that had been undertaken, albeit, by a lesser amount. On that basis, the error was a technicality.

(b) There was no error in respect of the unconsented stream works.

(c) The Appellant had agreed with the Council to apply under s127 of the RMA to change or vary the conditions of consent in order to address the errors that had been identified in that consent. The Appellant never lodged such an application; another project manager was retained to do so, some months later.

[26] On those grounds, the Council submits that there was no successful party, the proceedings were withdrawn at a very early stage and so the circumstances indicate that costs should lie where they fall.

[27] In response to the issue raised about who was served with an abatement notice, the Council says that the Appellant had been involved in all correspondence with the Council about the project and appeared to be acting in a managerial role. It points out that under s 322 of the RMA an abatement notice may be served on any person and the evidence shows that the Appellant was sufficiently connected to the works to justify being issued with an abatement notice.

[28] In relation to quantum, the Council submits that the amount claimed is too great because the matters covered in the invoice of counsel for the Appellant are too broad, inappropriately relating to matters not directly related to attendances on the appeal. In the absence of a detailed breakdown of costs in terms of attendance, the Council submits that the narration appears to include work done for other recipients of abatement notices, without prejudice discussions prior to the notice of appeal being file. The Council says:

> that the only steps taken in this appeal were the drafting of the notice of appeal, the drafting of the application for stay, finalising the affidavit in support of the application and attendance at two judicial telephone conferences.

[29] In relation to the allegations that aggravating factors are present, the Council notes that none of the specific aggravating factors identified in the Court's Practice Note have been referred to. In relation to knowledge, the Council says that:

> While it was certainly aware of the consent, it had granted and had undertaken monitoring, it is not reasonable to suggest that the Council can monitor every consent closely.

[30] In relation to the Council's responsiveness to the concerns raised by the Appellant and the withdrawal of the appeal, the Council says:

> Relying on the evidence of its compliance officer, that discussions were continuous and that, at the end of the process, the result was that the Appellant was in breach both in respect of the amount of earthworks and the in-filling of the stream.

[31] In terms of other procedural methods available, the Council notes that it could have amended or re-issued the abatement notice to address the error in the quantum of earthworks.

**Evaluation**

[32] The events in this case provide a salutary lesson that care must be taken by applicants and their advisors in preparing and presenting applications for resource consent as well as by consent authorities and their officers both when processing and granting applications and when checking whether the consented activity complies with the terms and conditions of the consent. In particular, an application should clearly set out both the nature and the extent of the proposed activity in sufficient detail so that the particular rules that may be contravened and the extent of such contravention can be identified in terms that readily allow for compliance to be checked and the specific degree of any consented non-compliance can be stated in the resource consent and then in any enforcement document that may need to be issued.

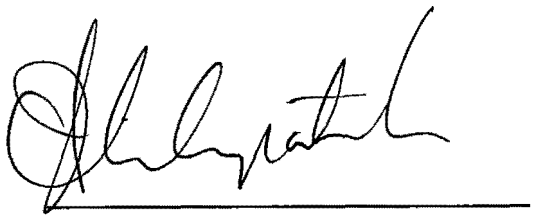
[33] In this case the application was unclear and needed to be supplemented by further information. That information did not find its way into the resource consent and consequently that consent was unclear, so that the enforcement officer misunderstood the extent of the activity that was within the scope of the resource consent. That misunderstanding was compounded by the fact that works had been undertaken which exceeded the grant of consent. It may be that this occurred because the contractor was working from an unclear consent document.

[34] It also appears that the communication between those undertaking the activity and those monitoring it and enforcing compliance may not have been as good as one could wish for, but given the underlying problems with the documentation it may be too much to expect later communication to overcome prior problems in the terms of the consent.

[35] Given that situation, it is difficult to reach any other conclusion than that both parties bear some responsibility for how these events played out. In light of that, and

considering the general principles for awards of costs under s 285 of the RMA,[4] I do not consider that this is a case where an award in favour of the Appellant against the Council is appropriate. In particular, I am not satisfied that there is a just basis for compensation in this case[5] or that the Appellant was forced to incur costs unnecessarily,[6] given the extent to which there were some earthworks that required a further consent.

[36] The Appellant's application is accordingly refused. I make no other order as to costs.



**D A Kirkpatrick**
**Environment Judge**


4 *Double R Developments Ltd v Western Bay of Plenty District Council* [2019] NZEnvC 009 at [7].
5 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* [1996] NZRMA 385.
6 *Paihia and District Citizens Assn Inc v Northland RC* (1995) 2 ELRNZ 23.