

BEFORE THE ENVIRONMENT COURT

I MUA I TE KOOTI TAIAO AOTEAROA

Decision No. [2020] NZEnvC 131

IN THE MATTER OF

an application pursuant to s320 of the
Resource Management Act 1991

BETWEEN

TUDOR HENRY CARADOC-DAVIES

HAMISH FORRESTER

GRAEME DESMOND GRANGER

JOHN EDGAR SAYCE PARKER

(ENV-2017-CHC-000032,33)

Applicants

AND

STEVEN ROBERT CLEARWATER

Respondent

AND

DUNEDIN CITY COUNCIL

Section 274 Party

Hearing: 18 June 2020

Court: (Then) Chief Environment Court Judge LJ Newhook, now
Alternate Environment Judge, sitting alone pursuant to s279 RMA

Appearances: The second, third and fourth named Initiators for themselves
P J Page and D McLaughlan for the Respondent
M R Garbett for the s274 party

Date of decision: 20 August 2020

Date of issue: 20 August 2020

**DECISION OF ALTERNATE ENVIRONMENT COURT JUDGE L J NEWHOOK
(NO. 5)**

Introduction

[1] The proceeding before me is the second application by the Clearwater parties seeking temporary uplifting of enforcement orders relating to the Clearwaters' quarry



on Otago Peninsula, the first such application having been refused in my oral decision on 25 February 2020, the fourth decision in what has become a series.¹

[2] The three stages prior to February had resulted in three decisions in 2017 and 2018.² The Clearwater interests are now again seeking temporary suspension of the enforcement order which was made in the third in the series of decisions in the following terms:

Pursuant to s314(1)(a)(i) RMA, the Court orders the Clearwater parties to carry out no excavation or blasting south of the black line labelled 45m contour (Moore plan October 2006) on the attached plan entitled Exhibit RL1 annexed to the affidavit of Mr R J Lusher sworn on 9 October 2018, until further order of the Court.

[3] The terms of the orders now sought are as follows:

- (a) To require remediation work to be completed as shown on the approved plans appended to LUC-2019-155/B being:
 - (i) Figure 1: proposed quarry extension/reinstatement plan dated 9 October 2018; and
 - (ii) Figure 2: proposed quarry extension/reinstatement cross-section dated 9 October 2019.
- (b) The remediation works shall be completed within six months of the date of this order;
- (c) The respondent shall comply with conditions 1, 2, 3, 4, 5, 8, 9 and 10 of LUC-2019-155/B;
- (d) The remediation works shall be undertaken in accordance with WorkSafe NZ Good Practice Guidelines: Health and Safety at Open Cast Mines, Alluvial Mines and Quarries November 2015.

[4] The application is supported by an affidavit of Mr M T Walrond, an engineering geologist who on this occasion stated his qualifications and experience which appear to me to be appropriate for the matters discussed in his affidavit.

¹ [2020] NZEnvC 016.

² *Granger & Ors v Clearwater & Ors* [2017] NZEnvC 91; *Granger & Ors v Clearwater & Ors* [2018] NZEnvC 132; *Granger & Ors v Clearwater & Ors* [2018] NZEnvC 201.



[5] I infer that the relief described above should be prefaced with some of the wording that appeared in the first application leading to the February decision, which read:

- (a) The order restricting excavation of blasting south of the black line labelled 45m contour (M Moore plan October 2006) on the plan entitled Exhibit RL1 annexed to the affidavit of R J Lusher sworn on 9 October 2018, is **temporarily suspended** to allow [the fresh resource consent] to be exercised [over a stated period];
- (b) After a period of six months after the date of suspension of the order or completion of the works in accordance with [fresh resource consent], whichever is earlier, the Consent Order shall be reinstated.

[6] In my February decision I discussed shortcomings with the resource consent then relied on for the application for suspension.

[7] Subsequent to my February decision the Clearwaters applied to the Council for a variation of the consent under s127 RMA to correct the problems, before lodging this fresh application.

Analysis

[8] All parties filed submissions and spoke to them in the hearing, at the end of which I reserved the Court's decision.

[9] It is apparent from the s127 decision of the senior planner under delegated authority dated 6 May 2020, that the two prime matters expressly considered by the independent hearing commissioner in granting the first consent LUC-2019-155-155/A, now varied, were:

- (a) Landscape and amenity;
- (b) Stability of the rockface.

[10] The landscape matters had been addressed in the landscape assessment of Mr Moore lodged with the first application, noting the extent of work proposed beyond the 45m contour that the Clearwaters' wished to reshape, and providing his advice.



There can be no doubt that the Independent Hearing Commissioner as Consent Authority considered that extent, and Mr Moore's advice, and granted consent expressly recognising the adverse effects same. The new variation does not affect that.

[11] The applicants (Granger, Forrester, Parker and Caradoc-Davies) do not agree with the advice of Mr Moore and the conclusions of the Independent Hearing Commissioner, but face difficulties as a matter of jurisdiction in continuing to mount opposition in the context of the current application.

[12] As to matters of stability of the rockface which the Clearwaters' seek to address in the current proceedings, I must consider whether the proposed work and effects have been expressly recognised by the Consent Authority in the new consent LUC-2019-155/B and its predecessor decisions to the extent not varied. I find that to be the case, the qualifications of Mr Walrond to give the relevant professional advice before the first consent was granted now being made clear to the Court. The applicants appear to want me to second-guess the substantive aspects of the consent, but again they face jurisdictional difficulties which I now discuss.

[13] As discussed in my February decision, s319 bears upon the situation. Section 319(2) creates a statutory bar concerning orders made under s314(1)(a)(ii), (b)(ii), (c), (d)(iv) or (da).

[14] The orders currently in force were made under s314(1)(a)(i).

[15] Section 314(1)(a)(i) provides:

Contravenes or is likely to contravene this Act, any regulations, a rule and a plan, a rule and a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, s10 (certain existing uses protected) or s20A (certain existing lawful activities allowed).

[16] I agree with the submission of counsel for the Clearwaters' that they now having obtained resource consent for rehabilitation works beyond the 45m contour, such works would not be in breach of the provision. If the applicants Granger and others are now seeking an order under this provision, they are prevented from doing so because there is now a resource consent.



[17] As to s314(1)(a)(ii), if the applicants are seeking orders under that, there is a statutory bar in s319(2), preventing as submitted by counsel for the Clearwaters, orders that would derogate from what is authorised within a resource consent where adverse effects have been expressly recognised by the person granting the resource consent. That provision is set out in paragraph [14] of my February decision, where I noted that express recognition of adverse effects by a decision-maker in a resource consent presents a complete statutory bar.

[18] I agree with the submissions of counsel for the Clearwaters' that condition 1 of consent LUC-2019-155/B can now (unlike in February) properly trace back to documents presented in support of the two applications as follows:

- (a) Geosolve Geotechnic Report dated 13 December 2018;
- (b) Report from Stantech dated 18 April 2019;
- (c) Geosolve Geotechnic Report dated 15 August 2019;
- (d) Additional correspondence on drafting of conditions attached as exhibits D and E of Mr Walrond's affidavit.

[19] I have no difficulty in finding that these matters have been expressly considered by the decision maker in terms discussed in case law, notably *Donkin v Board of Trustees of Sunnybrae Normal School*.³

[20] Mr Walrond's affidavit in support of the current application describes the contents of the reports and confirms his professional view that additional consent conditions are not necessary for this application and the sort of additional supervision recommended by Mr Granger and others is not presently contemplated or recommended.

[21] In his submissions counsel for the Council expressed its regret at the errors in the first consent, considered that all relevant adverse effects had now been expressly recognised in the resource consent as first issued and now varied, all professional reports now being correctly identified, and submitted that the Council was now supporting the present application by Clearwaters without reservations.

³ (1997) 3 ELRNZ 126 at 134.



[22] Mr Granger and others lodged a memorandum on 9 June 2020 and presented submissions in Court on 18 June. They also lodged further memorandum in answer to further information from the council, on 13 August.

[23] The applicants have continued in these documents to criticise the consent, not along the lines that the Court did in taking issue with 155/A in February, but questioning the veracity of the geotechnical evidence and putting forward their own beliefs as to how quarry remediation should be undertaken (expressly avoiding further excavation up Gearys Hill, in landscape and engineering terms). They also continued to express their displeasure at the recent applications to the Council not having been notified and at having been refused permission for their own experts to have access to the Clearwater property.

[24] They submitted⁴:

[9] If the allegations of illicit excavation prove to be correct, that the quarry operator has wilfully created this over steep face in breach of an Environment Court Order, given the operators known track record for non-compliance, that operator should not be authorised to action another ill-defined non-specific resource consent destroying even more of Gearys Hill.

[10] This consent LUC155/B contains information that cannot be relied upon, therefore the non-excavation order of the Court should not be lifted and the "remediation consent" requires rewording to ensure appropriate remedial works are tightly specified and completed.

[25] In their most recent memorandum, the applicants continue to endeavour to make a case that there have been breaches of the Environment Court enforcement order and an abatement notice issued by the Council against Mr Clearwater in July 2014, supported by plotted cross-sections from earlier proceedings and a photograph one of them took in October 2018. They point to the offence provisions in the RMA (s338 and 339) and s132(4)(a) and (b) RMA before making the somewhat sweeping assertion that:

The Act in these circumstances provides the Court wide-ranging powers to make orders and the Consent Authority has the ability to cancel the resource consent.

[26] The present proceeding being an application for temporary suspension of enforcement orders, is not a vehicle for questioning the latest resource consent or lack of notification of it, and neither is it a prosecution proceeding before the [District] Court.

⁴ Paragraph 9 of their submissions of 18 June 2020.



[27] For completeness, I have noted in passing a small flurry of activity in July that activated the 13 August memorandum by Mr Granger and others. It relates to an investigation conducted by an officer of the Council into allegations of illegal excavation by the Clearwaters' between October 2018 and 16 July 2020, I infer as a side-wind to the present application.

[28] Counsel for the Council attached to his memorandum of 22 July a new section produced by surveyors Paterson Pitts Group on 20 July 2020, which appears to show that there has been an excavation between the two dates, south of the 45m contour line.

[29] The memorandum of counsel simply advises that the Council will be formally asking Mr Clearwater to consider the information and provide an explanation. It does not foreshadow any particular legal action by the Council.

[30] On 7 August 2020 counsel for the Clearwaters' filed a memorandum in reply and an affidavit by Mr Clearwater. Mr Clearwater's response is that he has not undertaken excavation or earthworks south of the 45m contour, however there have been slips resulting in degradation of the quarry face and at times he has had to clear debris. He asserts that the slip material is not of any economic value. He reiterates that he wishes to take advantage of the recently granted resource consent to rehabilitate the area.

[31] The applicants in their subsequent memorandum question the truth of Mr Clearwater's claims.

[32] I do not go into the detail of these latest exchanges, because the present proceedings are jurisdictionally not an appropriate vehicle to do so. If the regulatory authority or any other party wishes to take enforcement of action of any kind, that is for them to do.

Orders

[33] For the reasons stated in the analysis above, I now make the following orders:

1. The order made on 12 October 2018 in the Court's decision [2018] NZEnvC 201, paragraph [14], is temporarily



suspended to enable the consent holders to utilise consent LUC-2019-155/B on the following terms.

2. The remediation works authorised by that resource consent are to be completed within six months of the date of this order.
3. The enforcement order is reinstated from six months after the date of this order, or earlier completion of the works authorised by the resource consent.
4. For clarity the remediation work to be completed is as shown on the approved plans appended to the resource consent being:
 - a. Figure 1: proposed quarry extension/reinstatement plan dated 9 October 2018; and
 - b. Figure 2: proposed quarry extension/reinstatement cross-section dated 9 October 2018.
5. For clarity, the respondents shall comply with conditions 1, 2, 3, 4, 5 8, 9, and 10 of the resource consent described in 1 above, and have signalled that the remediation work will be undertaken in accordance with WorkSafe NZ Good Practice Guidelines: Health and Safety at Open Cast Mines, Alluvial Mines and Quarries November 2015.
6. Costs are reserved.



L J Newhook
Alternate Environment Judge

