BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2020] NZEnvC 184

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders pursuant to s 316 of the Act
AND	of an application for costs pursuant to s 285 of the Act
BETWEEN	J RUSSELL
	(ENV-2020-AKL-065)
	Applicant
AND	S LENG
	First Respondent
AND	U & N GLOBAL LIMITED
	Second Respondent
AND	N & S NI
	Third Respondents

Court:	Judge J A Smith, sitting alone pursuant to s 279 of the Act
Hearing:	in chambers at Auckland
Appearances:	B Watts for Applicant W McCartney and L Fox for Respondent
Date of Decision:	30 October 2020
Date of Issue:	30 October 2020

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: The Court makes the following orders as to costs, enforceable at the District Court

at Auckland if necessary:

(a) as against the first respondent, second respondent and third respondent jointly and severally that they are to pay to the solicitors for J Russell (Meredith Connell) on behalf of Mr Russell the sum of $5,000 including GST and disbursements as contribution to the cost of filing these proceedings.

B: The proceedings are at an end and the file is to be closed.

REASONS

Introduction

[1] These proceedings were commenced in June 2020 to protect an oak tree on an adjoining property at 136 Mainston Road, Remuera, Auckland, for breach of conditions of consent in that there was a pad and pergola constructed within the drip line of an established oak tree.

[2] Subsequently, the construction was removed and the applicant withdrew their application for enforcement orders, but has filed this application for costs.

Application for costs

[3] The application for costs is opposed by the respondents. The application is made to cover the costs of filing proceedings being the legal costs in the sum of $7,155.00 relating to the drafting, filing and serving enforcement order together with affidavits and memorandum. The costs of Counsel involved Mr Watts resource management practitioner, seem unexceptional.

[4] In addition, the Applicant seeks reimbursement for the cost of an affidavit for Mr Scarlet, being the relevant expert arborist. The affidavit was filed in support of the application. The total costs are $8,305 including GST, and the applicant seeks $5,000 as a contribution to those costs.

[5] The application is opposed in full, on the basis:

(a) there was no deliberate harm done to the tree by the construction;

(b) that delays occurred while the applicant sought to obtain a retrospective consent for the works, and when they did not eventuate, they complied with the abatement notices;

(c) allegations of another tree being felled are not relevant; and

(d) Mr Russell sought to obtain payment for a significantly greater sum from the third respondent, Mr Ni, on 18 June 2020.

The background

[6] The tree is protected by conditions of consent, including condition of consent 14 which forbids works within the drip line of the tree, and condition 56 which requires the area beneath the tree to be landscaped in accordance with a specified landscape plan, and a covenant between the land owner and the Council. The tree overhangs the boundary with the Russell property, and is a large, mature oak tree which was, as at March 2019, in good condition.

[7] However, in March 2019 a concrete parking pad with a pergola over it and a shed were established directly under the protected oak tree. I accept, and it is not controverted, that this was in breach of conditions of consent and the covenant between the land owner and the Council.

[8] Mr Russell and other neighbours endeavoured to have the structures removed. In August 2019 the Council issued an abatement notice requiring removal by 18 September 2019. An infringement fine was issued by the Court in October 2019, however in November enforcement action was paused while an application for retrospective resource consent was processed. There were some three iterations of this application. In March 2020 the situation was still not resolved and COVID-19 intervened and steps were taken to ensure the tree was watered in the interim. Subsequently in May, Mr Ni was instructed to mulch and water the tree but water restrictions were applied.

[9] By late May 2020 Mr Russell indicates that they had had enough, and he instructed solicitors to prepare an application and brief an arborist to assist with an application for enforcement orders. At the beginning of June, concerns about the condition of the tree were identified by the arborist instructed, and on 9 June the Council indicated that no resource consent would be sought after all and the illegal structures would be removed. No timeframe was given. On 10 June the affidavits were sworn and the documents were

filed with the Court on 11 June 2020.

Was the application justified

[10] There is no dispute that the abatement notices were issued by the Council and the infringement fee, and that conditions of the consent exist. I am satisfied that the actions of Mr Russell were entirely justified in the circumstances. The suggestion that the breach should be allowed until such time as the retrospective resource consent has been fully considered seems to me to suggest that breach of consent has no consequences provided an application for retrospective consent is made. With respect that cannot be the case. The issue of the abatement notice is in itself a serious matter and all three respondents appear to have been in breach of that and at least Mr Ni from 18 September 2019.

[11] The suggestion that such an abatement notice is negated by a retrospective application, with respect, would undermine the very purpose of the notices and/or enforcement orders of the Court. The significant delay in removal of the illegal constructions after the date on which the abatement notice required them to be removed (18 September 2019), is of significant concern to this Court.

[12] It is surprising that no prosecution has been commenced. Nevertheless, it is a matter for the Council as to how they enforce their plan and their covenants, however this cannot prevent a third party seeking to enforce them. I conclude that the actions of Mr Russell was in that regard entirely reasonable.

[13] I also conclude that the outcome for Mr Russell has been successful, and that the illegal constructions have been (very belatedly) removed.

Aggravating and disentitling conduct

[14] Mr Russell refers to the removal of another tree. I accept Mr Russell may make a connection between any such circumstances and the resolution of this matter. However I accept the submissions of the respondent that that is irrelevant to the conclusion on costs of this matter. I also note there is a dispute as to whether, in fact, the activity with that other tree is illegal and who undertook it. For practical purposes I disregard that issue entirely.

[15] I also move on to the question of an allegation of disentitling conduct by Mr Russell. Apparently, on 18 June 2020, Mr Russell wrote to Mr Ni suggesting a settlement by payment of the sum of $40,000. Mr McCartney, for the respondent, says this email "might fall a little short of the definition of blackmail in s 237 of the Crimes Act 1961, but it contains elements of the offence". Mr Watts, in his response to this, says:

(a) the proceedings had been commenced, there was no threat to commence;

(b) there was no threat of disclosure;

(c) that none of the elements of blackmail are present, contrary to the respondents' submission which counsel considers to be inappropriate;

(d) the sum involved was all of the costs incurred from the start of the process with oak tree 6 until now, and was not dishonest in any respect;

(e) it was offered at an early stage in the hope of a satisfactory resolution and a response was received.

[16] I remind counsel of their code of conduct obligations in relation to allegations of serious misconduct. Although I do not intend to address the matter in any particular detail, it seems to me that necessary precursors to such an assertion have not been undertaken. In the circumstances of this case I cannot see that there is any element that would disentitle the claim by Mr Russell for a contribution to his costs.

The quantum of costs

[17] Having concluded that costs should be awarded, it is clear that this is not a case that would justify full indemnity. On the other hand, it has involved Mr Russell in procedures which would have been unnecessary had the respondents complied with the abatement notice.

[18] The applicant has sought reimbursement of $5,000 including GST, being around 60 percent of the total costs incurred. Having regard to the significant delay in complying with the Council's abatement notice, and the clear non-compliance with the conditions of consent, I consider a higher than normal payment is justified for the following reasons:

(a) the failure of the respondents to comply with the abatement notice issued;

(b) the clear non-compliance with conditions of consent and the covenant with the Council;

(c) the repeated applications for consent in circumstances where ongoing adverse effects on the tree were already noted.

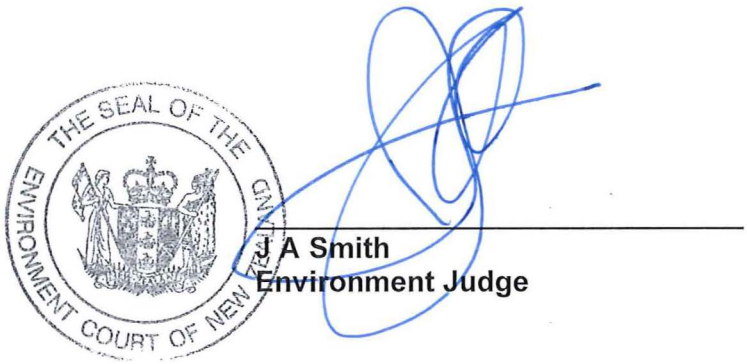
[19] Overall, I consider that the claim for $5,000, including as it does a claim for around $1,100 for the arborist, which I would pay in full, is not unreasonable. I conclude that I should make the following orders:

(a) that the first, second and third respondents are jointly and severally to pay to the applicant, or his solicitor (Meredith Connell, attention B Watts) the sum of $5,000 as a contribution towards the costs of these proceedings;

(b) that the said order may be enforced in the District Court at Auckland if necessary.

[20] This concludes matters on this file and this file may now be closed.

For the court:



J A Smith
Environment Judge