

**BEFORE THE ENVIRONMENT COURT
AT AUCKLAND**

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

Decision No. [2020] NZEnvC 188

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders pursuant to ss 314 and 319 of the Act
AND	of an application for Costs
BETWEEN	NEW ZEALAND FAIRY TERN CHARITABLE TRUST
	(ENV-2019-AKL-137: Enforcement)
	(ENV-2019-AKL-311: Declaration)
	Applicant
AND	AUCKLAND COUNCIL
	Respondent

Court: Judge J A Smith sitting alone pursuant to s 279 of the Act

Submissions: C Baker for New Zealand Fairy Tern Charitable Trust
S Quinn for Auckland Council

Date of Decision: 4 November 2020

Date of Issue: 4 November 2020

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: The Court concludes that there should be no order for costs in favour of either party. Costs are to lie where they fall.

B: The file may be closed.



REASONS

Introduction

[1] This application for costs follows at the end of a long and difficult process relating to an application for enforcement orders by New Zealand Fairy Tern Charitable Trust (**the Trust**) and subsequent concerns by the Court to achieve protection of the NZ Fairy Tern. This relates to a dam situated on land jointly owned (as to the bed of the stream by Land Information NZ (**LINZ**) and as to the banks by the Department of Conservation (**DoC**)).

[2] It is not necessary or helpful to go through the full terms of the decision of this Court, but I do note that after the original *Decision*¹ there was an application for declaration by the Trust which has subsequently been withdrawn (ENV-2019-AKL-311). It is, however, helpful to attach several of the Minutes² subsequent to the original decision to show the complexity of the situation. These are **annexed as A and B**

Background to the enforcement and declaration

[3] The Court concluded clearly in its decision, at paragraph [43] and [56(i)] that an enforcement application as against the Council must fail in the circumstances of the case. In brief, although:

- (a) the concerns of the Trust were real;
- (b) the Court was concerned about the continuing damming of the stream;
- (c) the effect on fairy terns and inanga spawning.

The application for enforcement orders itself was misconceived.

[4] The Court was concerned about the continuing effect of the dam on both fairy tern populations and inanga spawning, and sought to encourage the parties, including LINZ and DoC, to reach a resolution. This resolution took somewhat longer than anticipated, and the application for declaration was filed. Nevertheless, the position has now been regularised.



¹ *The NZ Fairy Tern Charitable Trust-v-Auckland Council [2020] NZEnvC 172*

² *NZ Fairy Tern Charitable Trust-v-Auckland Council [2019] (Minute dated 16 December) and NZ Fairy Tern Charitable Trust-v-Auckland Council [2020] (Minute dated 14 May)*

Costs Application

[5] The applicant has filed an application for costs on the Declaration application (ending 311) which was never heard. Although it does not specify what portion of that is sought it appears to be an application for indemnity costs of \$45,395.50. That application is opposed by Auckland Council, who indicate they have incurred costs of some \$89,616.50, including GST and disbursements, across both the Enforcement Order (ending 137) and Declaration proceedings (ending 311). They seek a contribution of 50 percent of those, namely \$44,808.25, essentially cancelling out the claim of the Applicant.

[6] The parties seem to agree that there is a broad discretion on the Court to award costs where that is just, but on a principled basis. It is not to penalise a party but to compensate another party where it is considered just to do so.³

[7] As was identified in *Thurlow Consulting Engineers & Surveyors*,⁴ there is a standard award band of 25-33 per cent of actual and reasonable costs claimed, into which most orders fall. I reiterate as I have in other decisions that this is the actual outcome as opposed to some standard form or rule by the Court. Most costs fall within this range where they are awarded at all. There are two further situations where increased costs are sometimes awarded:

(i) some of the *Bielby* factors are present;

(ii) there are special reasons; or

Indemnity costs are rarely awarded.

[8] In the case of District Councils, there is the additional constraint that there must be some action on the part of the Council which is considered blameworthy in the circumstances to justify an award against a Council undertaking its statutory functions. As was noted in the case of *Clark v Porirua City Council*,⁵ enforcement action seeking to have a Council enforce a District Plan provision is inherently a difficult matter.

[9] It is clear that the Council has a discretion as to how it is to enforce its plan.



³ *Auckland RC v Cash For Scrap*, 2007 EnvC Auckland 19 January 2007 at [16].

⁴ *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*, 2013 NZHC 2468.

⁵ NZEnvC W054/7, 29 June 2007.

Although this case was not exactly on all fours with that in *Clark*, there is a strong element of the Applicant seeking to force the Council to take action in relation to a resource consent that it had granted to a third party (which I shall refer to as the **Te Arai group**). The other complication here was that the Council had no control over the site itself – it was neither the landowner nor did it have any other rights of control, which were held by LINZ for the bed of the stream and DoC as to the margins.

Council action

[10] The Council make the point very clearly that it immediately identified:

(a) that the proceedings were misconceived as against it; and

(b) the Council was incorrectly identified as the party against which the enforcement order should be made.

[11] I accept that this was raised multiple times, including during judicial conferences and in correspondence, and in papers. I also accept that the Court refused to grant the application for enforcement orders. I accept the submission that the Council's involvement was only as a regulatory authority and there was no legal basis to issue enforcement orders against it. On the basis that there was no action by the Council that was blameworthy. This was an argument about its regulatory powers and where it was not the landowner or consent holder. Any application for costs against the Council must fail.

[12] Given my clear conclusion on this matter it is not necessary for me to go on to consider the quantum of the claim. I also acknowledge that the declaration application was filed against clear notice by the Council that the same was unnecessary and where it was subsequently withdrawn.

Should there be an award of costs in favour of the Council?

[13] I acknowledge the submission made by the Trust that the Court has a wide jurisdiction in this matter, and that issues of justice and fairness arise in considering an award of costs. I am satisfied that, as a result of the enforcement proceedings taken the situation in relation to the Te Arai Stream was regularised.



[14] The Court itself was most concerned at the situation which had developed and sought to encourage the parties to resolve that situation by removal of the dam as soon as possible.

[15] I acknowledge that the situation was complex, and was overlain by an application by Te Arai for a replacement bridge to allow access onto parts of their property, and the need to ensure that the works were undertaken in a way that did not exacerbate any adverse effect on either the inanga or on the fairy tern. Attempts were made at mediation in this matter, but unfortunately the parties appeared to be unable to reconcile their different points of view. In those circumstances, it does not appear to me that the blame can be laid either at the foot of the Trust or the Council, and I acknowledge there were complicating factors involving the ownership of the bed by LINZ and the margins by DoC.

[16] In equity and good conscience, I do not consider it is appropriate that I should make an order of costs against the Trust. It was motivated to achieve the preservation of one of New Zealand's rarest species, and I acknowledge the potential danger to the fairy tern population as a result of the dam in question.

[17] Although the actions of the Trust in taking proceedings against the Council were unwarranted, I acknowledge the level of frustration experienced by the Trust in raising this matter at multiple levels with the relevant government departments, councillors, mayors and Ministers in seeking to obtain a resolution.

[18] Accordingly, I have concluded that there should be no award for costs in favour of either party, and costs should lie where they fall.

Commentary

[19] This case is a clear example of the need for all parties to focus on the fundamental requirements of the Act, particularly in relation to the habitat of highly endangered species. The money spent on the legal proceedings in this matter would have been better spent on finding an enduring solution to the dam problem at a much earlier stage.

[20] This is a problem that should never have developed, given the threatened critical status of the NZ Fairy Tern and also the importance of inanga spawning areas. In this

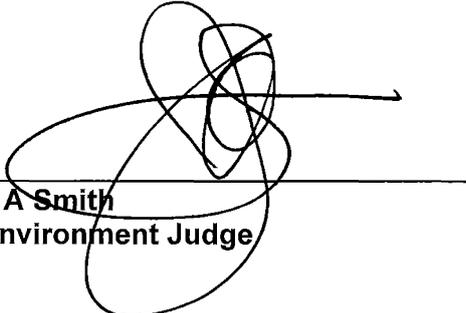


regard, I note that there appears to have been a significant expenditure of money upstream of the dam on inanga spawning areas when the dam continued to bar such spawning.

[21] Overall, I conclude this is a salutary lesson in the need for parties to focus on the environmental outcomes necessary rather than on litigation and blame. I strongly recommend that the Council consider trying to form some sort of multi interest approach to the issues at Te Arai, particularly as they relate to the fairy tern.

[22] Progress for the future turns on a high level of consensus as to the steps that need to be taken to improve the habitat for the fairy tern and inanga of the area, as well as the Mangawhai Harbour. This may need to involve cooperation with the Northland Regional Council.

For the court:



J A Smith
Environment Judge



A

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

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND of an application for enforcement order pursuant to section 316

AND of an application for declaration pursuant to section 311

BETWEEN NEW ZEALAND FAIRY TERN CHARITABLE TRUST
(ENV-2019-AKL-0000137 & 311)

Applicant

AND AUCKLAND COUNCIL
DEPARTMENT OF CONSERVATION
LAND INFORMATION NEW ZEALAND
MANGAWHAI FARM HOLDINGS LIMITED
TE ARAI COASTAL LANDS LIMITED
TE ARAI NORTH LIMITED
TE URI O HAU SETTLEMENT TRUST

Respondent

Court: Judge J A Smith

Appearances: E Price and H Rogan for New Zealand Fairy Tern Charitable Trust
S Quinn and B Ford for Auckland Council
B Arthur for Department of Conservation and Land Information New Zealand
H Atkins and T Gray for Mangawhai Farm Holdings Limited, Te Arai Coastal Lands Limited, Te Arai North Limited and Te Uri O Hau Settlement Trust

MINUTE OF THE ENVIRONMENT COURT FOLLOWING A PRE-HEARING
CONFERENCE ON 11 DECEMBER 2019
(16 DECEMBER 2019)



Introduction

[1] This matter relates to the enforcement order and the application for declaration proceedings in relation to the Te Arai Stream at Te Arai Regional Park.

[2] The Pre-Hearing Conference ("the Conference") was convened to discuss the approach proposed by Auckland Council for removing the dam at Te Arai Stream, and the application for directions filed by New Zealand Fairy Tern Charitable Trust.

Preliminary Matters

[3] Ms Arthur, counsel for Land Information New Zealand and the Department of Conservation, advised that the name of the respondent for Land Information New Zealand be changed to the Chief Executive.

[4] Ms Atkins advised that as Te Arai Coastal Lands have transferred their interests to Te Arai North Limited, they have no continued interest in this matter, and are to be removed as a party to the proceeding.

Removal of the Dam

[5] At the Conference, Te Arai North Limited, Auckland Council, Department of Conservation and Land Information New Zealand agreed that the removal of the dam should be undertaken cautiously and in stages. Additionally, all parties agreed that the primary concern is the survival of the Fairy Tern.

[6] Ms Rogan of New Zealand Fairy Tern Charitable Trust raised concerns that given the Fairy Tern feed at the mouth of the stream, there is that the stream may close in low flow, reducing fish to the stream. Accordingly, she argued that the dam be removed as soon as possible to maintain water during spring.

[7] Ms Atkins noted that Te Arai North Limited harvest the high flow of water during winter months, place it in tanks, and use it for irrigation. It is also stored for summer.

[8] Auckland Council's memorandum of 30 November 2019 outlines that the process in which the dam will be removed; a staged reduction of 500 metres to 1 metre. Consent was granted by Auckland Council for Monday, 9 December 2019. Te Arai North limited



have conferred with Auckland Council regarding this and outlined that a pre-commencement hearing is yet to take place to discuss the methodology of the process. Te Arai North Limited expressed no issue with New Zealand Fairy Tern Charitable Trust's involvement in this process.

[9] The Department of Conservation expresses concern that fast removal may result in the stream bed filling with debris, disrupting the Fairy Tern's habitat. Further, concerns were raised about the timeliness of the dam removal, as a March 2020 date may disturb inanga spawning. However, to maintain balance, it was agreed that a March/April 2020 objective for completion of removal was ideal to ensure it was removed by spawning season.

[10] Auckland Council has also expressed no issue in parties participating in the commencement of the dam's removal and is prepared to assist with competing interests.

[11] New Zealand Fairy Tern Charitable Trust argues that partial removal of the dam is not satisfactory, as it inhibits inanga spawning. The Trust seeks immediate demolition of the dam. The Trust records the view, without prejudice, that the dam should be removed entirely.

[12] The Court identified that the focus is to be on achieving consent and timing of consent as discussed with other parties, with staged removal by the end of **March 2020**. It was also indicated that if considered insufficient, parties should seek a declaration for enforcement.

[13] It was **directed** that a report as to the implementation of the resource consent, the outcome and any residual concerns be filed with the Court by **5 April 2020**. Auckland Council is to file the report.

Declaration Proceedings

[14] Auckland Council submitted that until the process ends in March 2020, the declaration proceedings should be adjourned. The Department of Conservation and Land Information New Zealand agree with adjournment.



[15] The Department of Conservation and Land Information New Zealand also request they are not involved in the declaration proceedings, as they have no interest in the water permit.

[16] New Zealand Fairy Tern Charitable Trust considers that if they were to adjourn their declaration proceedings, it raises concerns of restarting evidential issues.

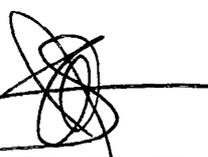
Directions

[17] The Court **directs**:

- (a) that evidence on for the applicant on the declaration issue be filed by **31 January 2020**;
- (b) a **pre-hearing conference** is to be held in the week of **10 February 2020**;
- (c) any other interlocutory matters can also be addressed.

[18] The Court also records that Te Arai Drainage Board is also to be served as a party.




Judge Smith
Environment Judge

B

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

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND of an application for enforcement orders under sections 314 and 319 of the Act.

AND of an application for declaration pursuant to section 311 of the Act

BETWEEN NEW ZEALAND FAIRY TERN CHARITABLE TRUST
(ENV-2019-AKL-000137 & 311)

Applicant

AND AUCKLAND COUNCIL

DIRECTOR-GENERAL OF CONSERVATION

CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND

TE ARAI NORTH LIMITED

TE ARAI COASTAL LANDS LIMITED

MANGAWHAI FARM HOLDINGS LIMITED

TE URI O HAU SETTLEMENT TRUST

Respondents

Judge: Judge JA Smith

Appearances: E Price and H Rogan for New Zealand Fairy Tern Charitable Trust (**NZ Fairy Tern**)
H Atkins for Te Arai North Limited, Te Arai Coastal Lands Limited, Mangawhai Farm Holdings Limited and Te Uri O Hau Settlement Trust (**TANL**)
B Arthur for Director-General of Conservation (**DOC**) and Chief Executive of Land Information New Zealand (**LINZ**)
S Quinn for Auckland Council
C Myers (Hearing Manager, Environment Court)

Date of Issue: 15 May 2020



**MINUTE OF THE ENVIRONMENT COURT FOLLOWING A JUDICIAL TELEPHONE
CONFERENCE
(14 MAY 2020)**

Introduction

- [1] This matter relates to the application for enforcement orders and the application for declaration proceedings in relation to the Te Arai Stream at Te Arai Regional Park.
- [2] The Judicial Telephone Conference (**the Conference**) was convened to discuss:
- (a) the delays in the removal of the dam at Te Arai Stream; and
 - (b) NZ Fairy Tern's application for stay for the scheduled hearing on the declaration of proceedings matter.

Further Report Dates

- [3] At the Conference, it was concluded that the Applicant's primary issue is the removal of the dam.
- [4] Given concerns of the environmental impact the delay in dam removal may cause, completion of this work is strongly encouraged by the court.
- [5] Furthermore, it was also concluded that the easements granted by DOC may assist NZ Fairy Tern in assessing the issue of declaration. Until those easements are clarified, it would be premature to set the declaration issue down for hearing.

Directions

- [6] Accordingly, the Court **directs**:
- (a) the matter is adjourned until **5 June 2020** for a further report by Auckland Council, concerning the dam's removal;
 - (b) TANL are to provide the Court and parties with the easements granted by DOC and LINZ by **5 June 2020**; and
 - (c) NZ Fairy Tern are to respond with their position to the above matters by **12 June 2020**.



[7] If the matter is not resolved, then a further Pre-Hearing Conference or Judicial Telephone Conference will be convened to resolve the course of action.



Judge J A Smith
Environment Judge

