

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

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

Decision [2023] NZEnvC 165

IN THE MATTER OF

an application for enforcement orders
under ss 314 and 316 of the Resource
Management Act 1991

BETWEEN

AMBER WASON AND GARETH
HALL

(ENV-2022-AKL-244)

Applicants

AND

TWO KOONER PROPERTIES
LIMITED

Respondent

Court: Environment Judge S M Tepania sitting alone

Appearances: A Cameron for the Applicants
S Kooner for the Respondent

Date of Decision: 8 August 2023

Date of Issue: 8 August 2023

DECISION OF THE ENVIRONMENT COURT ON SECTION 315 RMA

- A: For the purposes of clarification, the date for compliance with condition [2](f) of the Enforcement Order in relation to provision of the \$75,000 bond by the Respondent is 11 August 2023.
- B: Under s 315(2) of the Act, in the event of the Respondent's non-compliance, the Court consents to the Applicants undertaking the works required under the Enforcement Order issued 11 July 2023, from and including 12 August 2023,



and seeking recovery as a debt due.

- C: For the purposes of complying with the Order, the Applicants and their agents are authorised to enter the Respondent's property at 54 Parker Avenue, New Lynn and complete the works the subject of the Order. The Applicants are to provide 24 hours' notice to the Respondent prior to the works commencing. Pursuant to s 352(1AA) of the Act, service for Mr Kooner will be via his email address s.koonerz@yahoo.co.nz.
- D: In complying with the Enforcement Order the Applicants may exercise the powers in s 315(2) (a) to (c) of the Act.
- E: Leave is granted to the Applicants to join the director of the Respondent, Mr Kooner, as a party to the Enforcement Order under s 321 of the RMA, subject to compliance with that provision. Pursuant to s 352(1AA) of the Act, service for Mr Kooner will be via his email address s.koonerz@yahoo.co.nz.
- F: The parties are granted leave to return to the Court if any issues arise relating to the implementation of the Enforcement Order.
- G: Costs are reserved.

REASONS

Introduction

[1] Amber Wason and Gareth Hall (**Applicants**) applied to the Court on 22 December 2022 for an enforcement order against Two Kooner Properties Limited (**Respondent**) under s 314(1)(b)(ii) and 314(1)(c) of the Resource Management Act 1991 (**RMA**).

[2] The application for enforcement orders applied to property located at 52 and 54 Parker Avenue, New Lynn.

[3] The Court made the enforcement order sought under s 314(1)(c) RMA on 11

July 2023 (**Enforcement Order**).¹

[4] On 3 August 2023 Counsel for the Applicants filed a memorandum requesting an urgent teleconference seeking further directions in relation to implementation of the Enforcement Order. The memorandum was accompanied by two further affidavits from:

- (a) Christopher Dykes, the solicitor for the Applicants; and
- (b) Malcolm Stapleton, the Applicants' engineer.

[5] The memorandum sets out the Applicants' concern that works at the Property are continuing at pace, including late evening works outside the hours stipulated in the consent. The Applicants also note it appears marketing efforts for the Property have intensified with multiple viewings having taken place.

[6] Of particular concern, and as set out in the accompanying affidavits, no progress has been made by the Respondent since delivery of judgment towards compliance with the Enforcement Order namely:

- (a) the engagement of Babbage Consultants to undertake the necessary design work; or
- (b) the engagement of Pidgeon Judd to act as stakeholder for the bond of \$75,000.

[7] It appeared that Mr Kooner's responses, to date, had been to seek a fixed fee price from Mr Stapleton for the entirety of the works required from Babbage. Mr Stapleton confirms that is simply not possible, as there are multiple factors (principally relating to construction programmes) which are entirely outside Babbage's control.

[8] Mr Kooner has also given no reason for failing to execute Pidgeon Judd's terms.

[9] Counsel is concerned that the Respondent is simply "playing for time", in an

¹ *Wason & Hall v Two Kooner Properties Limited* [2023] NZEnvC 149

attempt to avoid the Enforcement Order. As required by the Enforcement Order, the design of the pile wall was to be completed by 11 August. Failing that, the Respondent will be in breach of the Enforcement Order and will be liable to criminal sanction.

[10] A Judicial Telephone Conference (JTC) was convened at 1pm on 4 August 2023 to discuss the matters raised by the Applicants and to hear the Respondent's response to those matters in order to determine next steps.

The issues

[11] Counsel sought orders:

- (a) granting consent to the Applicants under s 315 of the RMA to undertake the works required under the Order and seek recovery as a debt due;
- (b) in the alternative, seeking leave to join the director of the Respondent, Mr Kooner, as a party to the Enforcement Order under s 321 of the RMA; and/or
- (c) holding the director of the Respondent, Mr Kooner, in contempt of Court pursuant to s 282 of the RMA and s 16 of the Contempt of Court Act 2016.

[12] Mr Kooner, as the Respondent's director, spoke to the concerns raised by Counsel. He advised that he had not been ignoring the correspondence from Mr Stapleton or Pidgeon Judd, but had been too busy trying to complete the development and was facing a lot of financial difficulty and stress. He considered a more detailed quote from Mr Stapleton would assist to obtain finance and he was unable to begin the works without a plan.

[13] Further, he advised he could not afford to pay experts to assist and had therefore been trying to complete the Applicants' fence himself, estimating it could be complete in a week.

[14] Mr Kooner's initial view was that the Respondent was simply not in a position

to pay the \$75,000 bond as required by condition 2(f) of the Enforcement Order, and had been having difficulty raising finance to do so. However, by the end of the JTC he explained that by being required to undertake the works himself at a cost of \$75,000 and also having to pay a bond of \$75,000 up front, would mean he needed to outlay \$150,000.

[15] Mr Kooner offered two alternate options to the Applicants including:

- (a) construction of the fence within 7 days and a payment of \$55,000 paid within 10 working days; or
- (b) a payment of \$25,000 paid every month for 3 months to meet the \$75,000 in estimated costs for the works to be undertaken.

[16] Mr Cameron noted, in response, that Mr Kooner simply fixing the fence himself was likely to be inadequate, and what was needed was stabilisation of the land and the retaining works that had been agreed to by the experts. As it was the first time Mr Kooner had proposed any payment towards the costs of the works Mr Cameron did need to propose it to his clients, but was not confident it would be accepted given the experience they had had with the Respondent to date.

[17] I made preliminary inquiry of Mr Cameron at the JTC that, if this Court was minded to grant consent under s 315 as sought by the Applicants, whether that might preclude the parties from continuing discussions to reach some form of settlement given the proposals that now appeared to be on the table.

[18] Mr Cameron noted that while the Applicants wished to avoid unnecessary expense where possible, they still required some certainty that they could just get on with things.

Evaluation

[19] Accepting that the Respondent has not executed the necessary documentation, it appears the Respondent is not 'technically' in breach of Condition 2(c) of the Enforcement Order until 11 August 2023.

[20] However, as the terms of engagement for Mr Stapleton have not been executed by the Respondent such that the design is not yet underway, and given it will take Mr Stapleton a minimum of two weeks to complete the design and approval for construction, it is anticipated that a breach of the Enforcement Order is inevitable.

[21] As indicated to Mr Kooner at the JTC, having considered the Second Affidavit of Mr Stapleton I find that the Respondent has been provided with sufficient information to address the design of the pile wall as required by Condition 2(c) of the Enforcement Order, and all that remains is for Mr Kooner, in representing the Respondent, to confirm Mr Stapleton's engagement and responsibility for the fee as set out in the 1 August email. Failure to execute those terms has meant that Mr Stapleton cannot complete the design in the time required and therefore it is foreseeable that there will be a breach. That is all of Mr Kooner's own making.

[22] Further, Condition 2(f) requires payment of the bond of \$75,000 into the trust account of Pidgeon Judd (as stakeholder) for the costs of remediation, including to secure performance of the obligations in paragraph [1] of the Enforcement Order. While a date for payment is not explicit, the obligations include reinstatement of the Applicants' fence and installing a bored cast in-situ pile wall, designed and approved for construction by Mr Stapleton.

[23] It therefore follows that payment of the bond must occur prior to the design process anticipated by Condition 2(c) or at the very least be in line with it.

[24] On that basis, as indicated at the JTC and for the purposes of clarification, the date for compliance with Condition [2](f) of the Enforcement Order in relation to provision of the \$75,000 bond by the Respondent is 11 August 2023.

[25] As the Respondent has not engaged with either Babbage Consultants or Pidgeon Judd, and has not provided any indication that it intends to, non-compliance with the Enforcement Order can reasonably be anticipated.

[26] Further, by continuing to focus only on the fence repair without design or construction approval, Mr Kooner appears to be reverting back to a previous position

taken by the Respondent that all such engineering measures as recommended by Mr Stapleton are unnecessary. To be clear, that issue is now addressed by the Joint Witness Statement, where both experts, Mr Stapleton and Mr Prakash, are agreed as to the extent of works required including a “bored cast in situ retaining wall”.

[27] The Enforcement Order clearly requires the works to be carried out as designed and approved for construction by Mr Stapleton and in general accordance with the Babbage Consultants report. Those matters are not up for review.

[28] I determine that the Respondent has not provided any substantive response to anything advanced by the Applicants, has not taken any steps towards compliance and has created circumstances where non-compliance with the Enforcement Order can reasonably be anticipated. Allowing the Applicants to get on with the works will avoid further damage and allow them to get on with resolution of this matter.

[29] In relation to the second order sought by the Applicants, leave is granted to the Applicants to join the director of the Respondent, Mr Kooner, as a party to the Enforcement Order under s 321 of the RMA, subject to compliance with that provision.

[30] In relation to the third order sought, at this point I do not consider it necessary or appropriate to hold Mr Kooner, as the director of the Respondent, in contempt of Court pursuant to s 282 of the RMA and s 16 of the Contempt of Court Act 2016. However, I reiterate the caution I provided Mr Kooner at the JTC – that this is a serious claim, and he must give the Enforcement Order and its requirements the appropriate attention.

Outcome

[31] For the purposes of clarification, the date for compliance with condition [2](f) of the Enforcement Order in relation to provision of the \$75,000 bond by the Respondent is 11 August 2023.

[32] Under s 315(2) of the Act, in the event of the Respondent’s non-compliance,

the Court consents to the Applicants undertaking the works required under the Enforcement Order issued 11 July 2023, from and including 12 August 2023, and seeking recovery as a debt due.

[33] For the purposes of complying with the Order, the Applicants and their agents are authorised to enter the Respondent's property at 54 Parker Avenue, New Lynn and complete the works the subject of the Order. The Applicants are to provide 24 hours' notice to the Respondent prior to the works commencing. Pursuant to s 352(1AA) of the Act, service for Mr Kooner will be via his email address s.koonerz@yahoo.co.nz.

[34] In complying with the Enforcement Order the Applicants may exercise the powers in s 315(2)(a) to (c) of the Act.

[35] Leave is granted to the Applicants to join the director of the Respondent, Mr Kooner, as a party to the Enforcement Order under s 321 of the RMA, subject to compliance with that provision. Pursuant to s 352(1AA) of the Act, service for Mr Kooner will be via his email address s.koonerz@yahoo.co.nz.

[36] The parties are granted leave to return to the Court if any issues arise relating to the implementation of the Enforcement Order.

[37] Costs are reserved.



S M Tepania
Environment Court Judge

