

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ

Decision No. [2023] NZEnvC 191

IN THE MATTER

of the Resource Management Act 1991

AND

of an application for interim
enforcement orders under s320 and
s314 of the Act

BETWEEN

QUEENSTOWN LAKES DISTRICT
COUNCIL

(ENV-2023-CHC-90)

Applicant

AND

SILVER CREEK LIMITED

Respondent

Court: Environment Judge J J M Hassan

Hearing: In Chambers sitting alone under s309 of the Act

Last case event: 5 September 2023

Date of Decision: 6 September 2023

Date of Issue: 6 September 2023

DECISION ON *EX PARTE* APPLICATION FOR INTERIM
ENFORCEMENT ORDERS

A: Under s320, 314(1)(b)(i) and (ii) of the Resource Management Act 1991, this court orders that the respondent Silver Creek Limited, **by 4.30pm Friday 8 September 2023**, to the reasonable satisfaction of Queenstown Lakes District Council, ('QLDC') implement erosion and sediment controls

QLDC v SILVER CREEK LIMITED – *EX PARTE* INTERIM ENFORCEMENT ORDER



to minimise the amount of sediment exiting 4 Tree Tops Rise, Queenstown, entering water bodies and stormwater networks, in accordance with Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland region (Auckland Council Guideline Document GD2016/005) to:

- (a) ensure compliance with Rule 25.5.12 in Chapter 25 of the QLDC Proposed District Plan (PDP), which provides that:

Erosion and sediment control measures must be implemented and maintained during earthworks to minimise the amount of sediment exiting the site, entering water bodies and stormwater networks (Note: Compliance with this standard is generally deemed to be compliance with Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland region. Auckland Council Guideline Document GD2016/005).

- (b) avoid, remedy or mitigate any adverse effect on the environment caused by or on behalf SCL.

- B: QLDC shall forthwith serve a copy of these orders on Silver Creek Limited.
- C: The orders shall take effect upon their service on Silver Creek Limited.
- D: The orders shall apply to the personal representatives, successors, and assigns of Silver Creek Limited to the same extent as they apply to Silver Creek Limited.
- E: Silver Creek Limited must permit employees and/or contractors of QLDC to enter the site between 9:00am to 5:00pm to determine whether it has complied with the orders.
- F: These orders shall apply until further order of the Court, unless and until all necessary resource consents are obtained to ensure the earthworks activities on the site are fully compliant with all legal requirements.

- G: Silver Creek Limited may apply, on short notice, for cancellation or modification of these orders.
- H: Costs are reserved, although I note that costs will not typically be awarded on an interim enforcement matter such as this.

REASONS

Introduction

[1] QLDC is statutorily responsible for the administration and enforcement of the PDP. It applied *ex parte* for interim enforcement orders under s320, 314(1)(b)(i) and (ii) of the RMA¹ against Silver Creek Limited ('SCL').² The application is supported by a memorandum of counsel and an affidavit of Samuel de Reeper, a warranted QLDC Monitoring, Enforcement and Environmental Officer. Both those supporting documents are dated 5 September 2023.

[2] The location for which the interim enforcement orders are sought is 4 Tree Tops Rise, Queenstown, legally described as Lot 2 DP 409335 ('the site'). The site is roughly rectangular and approximately 33.7ha in area. It extends in an east west direction across the mid-slopes of Queenstown Hill above the existing residential development of Goldfield Heights. It is traversed by two permanently watercourses³ and several ephemeral waterways that drain to Lake Wakatipu. The site is located in a wāhi tūpuna area.⁴

[3] The application seeks orders requiring that within 48 hours, SCL implement erosion and sediment controls to minimise the amount of sediment exiting the site, entering water bodies and stormwater networks, to comply with rule 25.5.12 of the

¹ Resource Management Act 1991.

² Application for interim enforcement order dated 5 September 2023.

³ Silver Creek and Minor Stream.

⁴ Te Tapunui (Queenstown Hill) is listed in the schedule of Wāhi Tūpuna at cl 39.6 of the PDP as an area with Manawhenua values, namely wāhi taoka and wāhi tapu.

PDP, and to avoid, remedy or mitigate any adverse effect on the environment caused by or on behalf of SCL.

[4] QLDC seeks the orders be made on the following terms and conditions:

- (a) SCL must permit employees and/or contractors of QLDC to enter the site between 9:00am to 5:00pm to determine whether it has complied with the orders;
- (b) the orders shall apply to the personal representatives, successors, and assigns of SCL to the same extent as it applies to SCL; and
- (c) the orders apply until further order of the court, unless and until the respondents obtain the necessary resource consents from QLDC required to ensure the earthworks activities on the site are fully compliant with all legal requirements.

[5] The application is sought on an *ex parte* basis in view of the environmental risks associated with potential adverse weather in coming days and other information provided by Mr de Reeper.

Background to application

[6] On the basis of the memorandum of counsel and the affidavit evidence, I understand the background to the application for the interim orders is as follows:

- (a) SCL applied for and was issued a resource consent (RM200095) authorising 49,260m³ of earthworks to form access tracks to enable the clearance of vegetation at the site;⁵
- (b) site inspections have been carried out by QLDC on 24 July 2023, 14 August 2023, 21 August 2023 and 1 September 2023;
- (c) QLDC issued AN23/0007 dated 31 July 2023 in relation to the unauthorised earthworks requiring a suitably qualified and

⁵ Resource consent (RM200095) was issued on 2 June 2020.

experienced professional to update the sediment and erosion control plan⁶ and to install and maintain sediment and erosion control measures in accordance with the control plan. Compliance was required by 8 and 11 August 2023 respectively;

- (d) approximately 1,000m² of earthworks has been undertaken within a tributary of Silver Creek at the site that was not expressly authorised by SCL's land use consent (RM20095) or any other resource consent;
- (e) SCL has failed to install and maintain adequate erosion and sediment controls. Silt fences have been installed at the site. However, these do not comply with the Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland region (Auckland Council Guideline Document GD2016/005);
- (f) sediment laden discharges have been observed entering the tributary of Silver Creek confirming that the sediment controls are not functioning correctly; and
- (g) the earthworks remain unstable and there is risk of further discharges of sediment laden water into the streams at the site and, if there was significant rainfall, into Lake Wakatipu.⁷

Consideration

[7] Except as provided for in s320, RMA, ss 314 – 319 apply to the application for and determination of an interim enforcement order (s320(1)).

[8] QLDC seeks interim orders in terms of s314(1)(b)(i) and (ii) which provides:

314 Scope of enforcement order

- (1) An enforcement order ... may ...:

⁶ As required by condition 5 of RM200095.

⁷ The MetService extended weather forecast predicts an increasing possibility of rainfall in Queenstown from Thursday 7 September 2023 through to Monday 11 September 2023.

- (b) require a person to do something that, in the opinion of the court, is necessary in order to –
 - (i) ensure compliance...with this Act ... a rule in a plan... or a resource consent; or
 - (ii) avoid remedy or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person ...

Effects on the environment of not making the order

[9] Section 320(3)(a) RMA requires the court to consider what the effect of not making an interim order would be on the environment. As set out in the memorandum of counsel and Mr de Reeper's affidavit, a tributary of the Silver Creek waterway and adjacent areas has been disturbed by unconsented earthworks. The area in and around the tributary currently remain unstable.

[10] Any significant rainfall risks movement of material from the unstable hillside into the waterway where it can be carried through to Lake Wakatipu.⁸ At present the long-range weather forecast predicts an increasing possibility of rainfall.⁹ Mr de Reeper details there is an imminent risk of a discharge of sediment into Silver Creek at the next rainfall event if interim orders are not made.¹⁰

[11] I am satisfied the circumstances described in the application pose a serious risk to the extent that if immediate action is not taken the aquatic ecosystem of Silver Creek, and where it enters Lake Wakatipu, will be adversely affected by sedimentation.

The lack of undertaking as to damages

[12] Under s320(3)(b) RMA the court is required to consider whether the

⁸ Affidavit of Samuel de Reeper, at [68].

⁹ From Thursday 7 September 2023 through to Monday 11 September 2023.

¹⁰ Affidavit of Samuel de Reeper, at [35]-[36], [67]-[72].

applicant has given an appropriate undertaking as to damages. It is however, well settled that an undertaking as to damages may not be necessary in circumstances where:¹¹

- (a) the applicant is protecting public, rather than private interests or is a consent authority performing a regulatory role; and
- (b) there is no question that the applicant would be financially capable of meeting any award of damages.

[13] QLDC submits that each of the above factors applies and notes that any damages SCL is expected to suffer primarily relates to having to promptly install erosion and sediment controls which it is already obliged to do under the PDP and its land use consent RM200095.¹²

[14] I agree with QLDC's submission that any cost to SCL of implementing appropriate erosion and sediment controls is a proportionate expense when weighing the gravity of the risk to the environment.

Should I hear from the respondent?

[15] The court is required by s320(3)(c) RMA to consider whether it should hear the applicant or the respondent. This corresponds to the power in s320(2) to make interim enforcement orders without notice under s317 and without holding a hearing. The applicant has sought that the interim orders be made without notice.

[16] Given the history of non-compliance outlined in Mr de Reeper's affidavit, QLDC submits it is clear that there is a real risk that there will be significant adverse environmental effects and accordingly it is appropriate that the application

¹¹ *Dunedin City Council v Saddle Views Estate Ltd* [2015] NZEnvC 24 at [15]; *Palmerston North City Council v Golf City Developments Ltd* [2014] NZEnvC 264 at [11]; *Waikato Regional Council v Cox Environment Court*, A045/98.

¹² Memorandum of counsel dated 5 September at [6.3]-[6.5].

be determined *ex parte*, on the papers.

[17] Mr de Reeper has detailed that persons undertaking earthworks are obliged to minimise any erosion, land instability, sediment generation and off-site discharges through the use of erosion and sediment controls and remediation. Further, the PDP places limits on the volume of earthworks undertaken within 10m of the bed of any water body, drain or water race that flows into a lake or river or within a Te Tapunui (Queenstown Hill) Wahi Tupuna area. The PDP also requires that erosion and sediment control measures be implemented and maintained during earthworks in accordance with the Erosion and Sediment Control Guide for Land Disturbing Activities in the Auckland region (Auckland Council Guideline Document GD2016/005) as the standard.¹³

[18] The affidavit records that SCL appears to dispute QLDC's allegations as to the earthworks undertaken and SCL's compliance with the conditions of consent.¹⁴ However, on this occasion I consider that an interim order be made, notwithstanding that SCL has not yet had an opportunity to be heard.

[19] That is because, *prima facie*, there is a high degree of urgency indicated by the application and accompanying evidence in that serious environmental harm could ensue, should there be significant rainfall in coming days.

[20] Mr de Reeper records a poor compliance history for the property to date with a total of five abatement notices having been issued in respect of this property.¹⁵ Furthermore, there is evidence that SCL has continued to operate in contravention of its resource consent and the PDP, despite QLDC's efforts. On the material before me, therefore, I cannot assume SCL would take necessary measures in the absence of an order being made. Rather, the information before

¹³ Affidavit of Samuel de Reeper, at [21]-[22], referring to PDP Obj 25.5.1 and pol 25.2.1.1 and rules 25.5.19.1, 25.5.10 and 25.5.12.

¹⁴ Affidavit of Samuel de Reeper, at [58]-[66].

¹⁵ Affidavit of Samuel de Reeper, at [71].

me causes me to take a cautious approach and so make the order without delay.

[21] A further consideration is that the application does not provide contact details of SCL such as may have otherwise allowed for the convening of an urgent short notice hearing, including by remote means.

[22] Furthermore, s320(5) RMA confers on a respondent the right to seek to change or cancel this order as soon as practicable after service of the order. Additionally, s320(4) provides that an interim order takes effect from when it is served (or such later date as the order directs).

[23] Mindful of these matters, I have specifically recorded in the order that it is to take effect upon its service on the respondent and the respondent may apply, on short notice, for cancellation or modification of this order.

Such other matters that the Judge thinks fit

[24] As it transpires, I am currently in Queenstown until close of business Friday and hence potentially available at short notice should SCL make any application under s320(5) and seek any urgent hearing on any matter. To those ends, it would be important for SCL to proactively communicate with QLDC and my Hearing Manager Ms McKee.

Outcome

[25] For the reasons I set out, I find it is necessary that I make the interim orders without requiring prior service or holding a hearing (s320(2) RMA).

[26] The interim orders are made as set out in A – G. SCL is reminded that it is an offence under s338(1)(b), RMA to contravene, or permit contravention of, an enforcement order.



J J M Hassan
Environment Judge

