IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 194

IN THE MATTER OF	an application under s 314 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 Environment Commissioner A Leijnen
Hearing:	10 July 2023
Appearances:	A Cameron for the Applicants S Kooner for the Respondent
Date of Decision:	8 September 2023
Date of Issue:	8 September 2023

DECISION OF THE ENVIRONMENT COURT ON SUBSTANTIVE ISSUES

A: Under ss 314 and 319 of the Resource Management Act 1991 (**RMA**), the Court makes the enforcement order annexed to this decision.

B: A condition requiring payment of a bond of $75,000 will be imposed.

C: For the avoidance of doubt, this decision sets out the reasons for the granting of the enforcement order in this matter issued 11 July 2023.

D: The parties are granted leave to return to the Court if any issues arise relating to the implementation of the enforcement order.

E: The Court will address the issue of costs claimed under s 314(1)(d) and/or s 285 of the RMA in a further decision in due course. In the meantime, costs are reserved.

REASONS

Introduction

[1] On 22 December 2022, Amber Wason and Gareth Hall, the Applicants, filed an application for enforcement orders against the Respondent, Two Kooner Properties Limited. The application sought that the Respondent address the adverse effects caused by it or on its behalf, in relation to its failure to undertake earthworks along the common boundary between 52 and 54 Parker Avenue in accordance with the conditions of its resource consent LUC60369202/BUN60368201.

[2] The Applicants sought that the Court grant enforcement orders to:

(a) require Two Kooner Properties Limited to undertake remedial works as necessary to remedy the adverse effects on the environment caused by it or on its behalf under s 314(1)(b)(ii) of the RMA, more specifically the damage caused to the Applicants' property at 52 Parker Avenue, New Lynn, Auckland as a result of the Respondent's works at 54 Parker Avenue, New Lynn;

(b) in the alternative, require Two Kooner Properties Limited to avoid, remedy or mitigate the adverse effects on the environment caused by it or on its behalf under s 314(1)(c) of the RMA, more specifically the damage caused to the Applicants' property at 52 Parker Avenue, New Lynn, Auckland as a result of the Respondent's works at 54 Parker Avenue, New Lynn; and/or

(c) in the alternative to and/or in addition to orders (a) and (b) above, require Two Kooner Properties Limited to pay money to or reimburse the Applicants for any actual and reasonable costs and expenses the Applicants have incurred or are likely to incur in avoiding, remedying or mitigating any adverse effect on the environment, where the Respondent failed to comply with the conditions of its resource consent

LUC60369202/BUN60368201 under s 314(1)(c) of the RMA (including all costs of investigation, supervision and monitoring of the adverse effects on the environment, and the costs of any actions required to avoid, remedy or mitigate those effects);

(d) pay the Applicants' costs of and incidental to these proceedings.

[3] The Respondent agreed that an order should be made, but opposed the application in part only as it relates to:

(a) the construction of a "bored cast in situ retaining wall" and works associated with and/or incidental to those works as part of the remedial works to be undertaken;

(b) the requirement to pay all the Applicants' legal and expert costs associated with the proceedings.

[4] The matter was set down for hearing on 10 July 2023.

The issues

[5] The adverse effects complained of by the Applicants arise from an acknowledged failure by the Respondent to undertake earthworks along the common boundary between 52 and 54 Parker Avenue, New Lynn in accordance with the conditions of its resource consent.

[6] The Joint Witness Statement filed by the parties' respective expert civil engineers (**experts**) on 19 June 2023 and subsequent to the Notice of Response dated 7 June 2023, confirmed that the Respondent's failure to comply with the conditions of its resource consent, is likely to have caused the damage to the Applicants' property.

[7] The experts also agreed that the only practical way to prevent further soil movement damaging the foundations at 52 Parker Avenue is to construct the bored cast in-situ wall as sought by the Applicants.

[8] The experts confirmed there were no remaining areas of disagreement between them.

[9] The Respondent has agreed that it will complete the works and cover the costs of Mr Stapleton, the Applicants' expert civil engineer, in supervising them.

[10] On the basis of the above and the Respondent having agreed that an order should be made, the Court accepts that the order is a reasonable one to make in the circumstances.

[11] The two remaining areas of disagreement between the parties were:

(a) whether a bond of $75,000 should be paid into a stakeholder account as security for performance of the obligations under the enforcement order; and

(b) costs claimed under s 314(1)(d) and/or s 285 of the RMA.

The bond as security for performance

Legal principles applying to the imposition of bonds

[12] Section 314(3) of the RMA states:

> (3) Except as provided in section 319(2), an enforcement order may be made on such terms and conditions as the Environment Court thinks fit (including the payment of any administrative charge under section 36, the provision of security, **or the entry into a bond for performance**).
>
> **(emphasis added)**

[13] Bonds have been imposed as conditions to orders under s 319 of the RMA in several previous cases,[1] including where the risk of insolvency is an issue.[2]

[14] Bonds have also been imposed as conditions of consent pursuant to s 108A of the RMA to secure the ongoing performance of conditions relating to long-term effects.[3] Risk of insolvency and uncertainty about a party's willingness to comply have

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[1] *Waikato Regional Council v Were Enterprises Ltd* PT Auckland A66/96, 5 August 1996 (by consent); *Waikato Regional Council v Price* DC Thames CRN 5075003143, 16 July 1996; *Burr v Waikato Regional Council* [2013] NZEnvC 232.

[2] See, for example, *Southland Regional Council v Taha Asia Pacific Limited* [2015] NZEnvC 16 (by consent) – Taha Asia went into liquidation a year later.

[3] *Remediation (NZ) Ltd v Taranaki Regional Council* [2023] NZEnvC 78.

been cited as reasons for the imposition of a bond in previous cases.[4]

[15] In *Cross Group Ltd v Dunedin City Council*[5] the Court held that the constrained financial position of the [party], which limits its ability to provide security for its bond to perform certain consent conditions, is not relevant to the reasonableness of the requirement for a performance bond with the usual security.

Consideration

[16] It is the Applicants' position that a bond is a necessity in this case and the pre-conditions for a bond as security for performance are met. Counsel for the Applicants, Mr Cameron, submitted that:

a) the sole real property owned by the Respondent is the land at 54 Parker Avenue, New Lynn and the development of the land is well advanced;

b) while practical completion had previously been estimated to be between 4 – 6 weeks away, the Respondent's marketing suggested that three lots (in the development) are being marketed on the basis they are scheduled to complete in August;

c) a bond is necessary to secure performance in circumstances where there is risk of insolvency; and/or where it is necessary to resolve uncertainties[6]; and

d) a bond is reasonable "*not as a penalty for past infringement, but because past events justify uncertainty about [a party's] willingness to comply with its obligations under the Act*".[7]

[17] The affidavit of Ms Wason establishes that Mr Kooner has been aware of the

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[4] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [286] per Glazebrook J; *Cross Group*, above n 1, cited with approval in *Remediation (NZ) Ltd,* above n 6 at [40]-[42].

[5] EC Christchurch C7/2008, 20 January 2008 at [27].

[6] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [286] per Glazebrook J.

[7] *Cross Group Limited v Dunedin City Council* EnvC Christchurch C7/2008, 20 January 2008 at [17].

damage caused to the Applicants' property for well over a year and acknowledged responsibility for that damage in November of last year. The circumstances set out in the affidavit also give rise to concern about the Respondent's willingness to comply with its obligations under the Act.

[18] Mr Cameron submitted that despite that acknowledgment, Mr Kooner has at various times indicated that he will only commit to repairing the fence which collapsed due to the subsidence.

[19] The Respondent's position is that it does not have the ability to pay a cash bond as it does not have cash available and has been unable to secure further lending to enable this, either by way of bank lending or private financing. Mr Kooner confirmed at the hearing that it was hard to get loans approved, that he was struggling to complete his own project and that he simply could not afford a bond.

[20] That raises a question as to the Respondent's solvency which, as submitted by Mr Cameron, would support the imposition of a bond.

[21] Counsel further submitted that the Court should treat the Respondent's claim to poverty with care noting that the Court is being asked to accept, without evidence and in the context of a six-lot development nearing practical completion, that the Respondent does not have access to funding to provide a $75,000 bond.

[22] Mr Kooner's response at the hearing was that completion of the development was 2-3 months away though he expected there to be some time before any sales of the properties might be realised given indications of time other properties in the area had been on the market.

[23] No other form of security has been offered by the Respondent, beyond the assurances through former counsel. It has not provided undertakings, personal guarantees, or offered a charge or lien against the property. Counsel for the Applicants submitted that there remains the very real prospect that the Respondent could, at any point following completion of the development, be wound up and if that were to occur, the Applicants would be left to pursue a claim through a liquidation as an

unsecured creditor, well down the order of priority.

Decision on bond

[24] Having considered the above matters and in particular the concern that the development is nearing practical completion, the risk of insolvency and potential for the Applicants to be left without an effective remedy against the Respondent, the imposition of a bond is appropriate.

[25] While the Respondent has indicated an inability to raise cash at this time, there is also no evidence before this Court to support the allegations made by the Respondent in this regard.

[26] The Affidavit of Mr Stapleton dated 21 April 2023, includes an estimate of costs to undertake the various aspects of works required to construct the bored pile wall at almost $75,000. It also records that the escalating cost of construction materials and labour associated with the shortage of both poses a significant risk this estimate may be less than the actual cost particularly if there is a considerable delay in being able to proceed in a timely manner.

[27] At the hearing, the Court raised this observation with Mr Cameron and noted that the Applicants may not have allowed themselves enough flexibility in limiting the bond sought to the amount of $75,000, being equivalent to the estimate provided by Mr Stapleton, which will not allow any room to move and may be exceeded.

[28] However, Mr Cameron submitted that an uplift would raise issues of fairness and was content for the bond to remain at $75,000.

[29] On the basis of the above the Court considers a condition requiring payment of a bond of $75,000 is appropriate.

Costs under s 314 and s 285 RMA

[30] In addition, the Applicants seek costs under s 314 and indemnity costs under s 285 of the RMA as follows:

(a) the costs of investigating, supervising and monitoring the adverse effects on the environment, and the costs of any actions required to avoid, remedy or mitigate those effects under s 314(1)(d), which are to be reimbursed on an actual and reasonable basis; and

(b) costs of and incidental to these proceedings, which are payable under s 285 of the RMA, and whether or not those costs can be included within the terms of any enforcement order.

[31] The Court will address the issue of costs claimed under s 314(1)(d) and/or s 285 of the RMA in a further decision in due course.

Outcome

[32] Under ss 314 and 319 of the Resource Management Act 1991, the Court makes the enforcement order set out and annexed to this decision as **Annexure A**.

[33] A condition requiring payment of a bond of $75,000 will be imposed.

[34] For the avoidance of doubt, this decision sets out the reasons for the granting of the enforcement order in this matter issued 11 July 2023.

[35] The parties are granted leave to return to the Court if any issues arise relating to the implementation of the enforcement order.

[36] The Court will address the issue of costs claimed under s 314(1)(d) and/or s 285 of the RMA in a further decision in due course. In the meantime, costs are reserved.

For the Court

S M Tepania
Environment Judge

Annexure A

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ENFORCEMENT ORDER

The Court makes the following enforcement order pursuant to ss 314(1)(b)(ii), 314(1)(c), 314(3) and 319 of the Resource Management Act 1991 (RMA) as follows.

[1] The Respondent, Two Kooner Properties Limited, is ordered to remedy the adverse effects on the environment caused by or on its behalf under s 314(1)(c) of the RMA by reinstating the Applicants' fence and installing a bored cast in-situ pile wall along the common boundary between 52 and 54 Parker Avenue, New Lynn:

(a) to be designed and approved for construction by Malcolm Stapleton of Babbage Consultants Limited; and

(b) in general accordance with the report provided by Babbage Consultants Limited dated 20 April 2023.

[2] The order in paragraph [1] above is made on the following conditions:

(a) that the cost of all remedial works and the design work under paragraph [1] above are to be met by the Respondent;

(b) any remedial works are to be supervised by Babbage Consultants Limited at the Respondent's sole cost;

(c) design of the pile wall and replacement fence and approval for construction is to be completed within one month of the order being made;

(d) an application for building consent is to be lodged with Auckland Council within two weeks of completion of the design in (c) above;

(e) construction of the designed and approved pile wall and replacement fence is to be completed within one month of building consent being obtained; and

(f) that to secure performance of the obligations in paragraph [1] above, a bond of $75,000 is to be paid into the trust account of Pidgeon Judd as stakeholder (or such other stakeholder as agreed between the parties) for the costs of remediation to be held pending completion of the works, the delivery of a PS4 by Babbage Consultants Ltd, and confirmation by the Applicants that all other costs under this Order have been met by the Respondent.

S M Tepania
Environment Court Judge