BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 110

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application pursuant to sections 321 and 279 of the Act
BETWEEN	AUCKLAND COUNCIL
	(ENV-2016-AKL-251)
	Applicant
AND	L MAO
	First Respondent
AND	J MAO
	Second Respondent
AND	EE KUOH LAU (AUGUSTINE LAU)
	Third Respondent and First Applicant under s 321
AND	JESUS (2016) COMPANY LTD
	Fourth Respondent and Second Applicant under s 321

Court:	Environment Judge JA Smith sitting alone pursuant to s 279
Hearing:	On the papers
Application:	Mr Lau for himself and Fourth Respondent
Submissions:	D Collins for Auckland Council
Date of Decision:	21 July 2017
Date of Issue:	21 JUL 2017

INTERIM DECISION OF THE ENVIRONMENT COURT

A: Pursuant to s 279(4) of the Act the Court directs that if the third and fourth Respondents disagree with the prospective action of the Court, then submissions are to be filed within five working days, together with any affidavits in support.

B: Auckland Council is to file any submissions and/or affidavits in response within a further five working days.

C: The Court will then conclude whether or not it can proceed to finalise this matter on the papers, conduct a telephone conference or set the matter down for a hearing.

D: Costs are reserved.

REASONS

Introduction

[1] Mr Lau and Jesus (2016) Company Limited (the 3rd and 4th Respondents) are subject to orders of the Environment Court issued on 16 December 2016 and subject to a minor correction on 7 January 2017. The respondents appealed that decision and were unsuccessful in the High Court. On 3 April 2017 the High Court struck out that appeal, confirming a Minute of 23 March 2017.

[2] On 17 July 2017 Mr Lau, acting on behalf of the 3rd and 4th respondents, filed an application to change the enforcement orders under s 321 of the Act. The Auckland Council has filed a memorandum in response, submitting that the change application ought to be struck out if it is not withdrawn, and reserving the right to apply for costs.

The reluctance of the Court to strikeout proceedings

[3] It is axiomatic that the power of the Environment Court to strike out proceedings under s 279(4) is rarely exercised, and only in the clearest cases. In considering such a course, the Court does not go beyond decisions of the Court and the terms of the application to determine any factual matters in relation to the case. The information justifying strikeout would need to be self-evident from those documents.

[4] Without relying on any affidavit evidence, the Court has before it a number of decisions in this proceeding which assist with understanding both the background to the matter and the prospects of success of an application for change. These are:

(a) the decisions of the Environment Court, including:

(i) ex parte decision [2016] NZEnvC 188;

(ii) oral decision of the Court [2016] NZEnvC 204;

(iii) substantive decision of the Court [2016] NZEnvC 251;

(iv) correction decision 27 January 2017 [2017] NZEnvC 5;

(v) costs decision [2017] NZEnvC 60; and

(b) the decision of the High Court at Auckland striking out appeal dated 3 April 2017 in CIV-2016-404-3225 by Hinton J.

Analysis of decisions

[5] It can be seen from Decision [2016] NZEnvC 251 that the respondents were required to undertake certain steps by 22 January 2017 (terminate tenancies); 6 February (fencing); decommission wastewater systems (houses 3, 4 and 5 and building 2) and under clause A(f)(iii) decommission the dwellings within both levels (upstairs and downstairs) of the converted garage connected to the main dwelling by removing the following:

(a) all kitchens and food preparation areas;

(b) any bathroom fixtures, including toilets, showers and vanities; and

(c) any internal wall or partition that is not identified on the original building plans held by the Council.

[6] In the event that the tenancies were not terminated by 22 January, the date for compliance remained at 22 January. If the wastewater systems were decommissioned, and tenancies terminated on the relevant dates, the applicant had until 20 February 2017 to undertake further works.

[7] Section 315 also applied, and the orders gave the Council the power to inspect,

and if the orders had not been complied with:

(a) comply with those orders on behalf of the respondents, and for that purpose enter upon the land or enter any structure (with a constable if the structure is a dwelling house);

(b) sell or otherwise dispose of any structure or material salvaged in complying with these orders;

(c) after allowing for any recovery of monies received, recover the costs and expenses of doing so as a debt due from the respondents; and

(d) register any remaining costs and expenses as a statutory lien charge against that property.

[8] It is clear from the decision that the obligation of the Respondents, including the 3rd and 4th Respondents, needed to be undertaken promptly, and certainly before the end of February 2017. The 3rd and 4th Respondents do not purport to have complied with the orders of the Court, nor is there any evidence that those have been modified or changed by any party including the High Court.

What is the application?

[9] The application to change the enforcement order seeks to change mandatory orders made in the substantive decision referred to above at paragraph A(f)(iii). The application for change simply seeks to delete items (a), (b) and (c) referred to in A(f)(iii), and also change the word "decommission" to "not decommission". In simple terms, it seeks to negate the order (cancel it).

[10] The grounds for this application are set out as:

(a) the bathrooms and kitchens are (both upstairs and downstairs) on precinct A as per attached A1-A5;

(b) the partition had minor effect on environment.

[11] In support of the grounds the 3rd and 4th respondents attach:

(a) photos of the actual location of bathrooms and kitchen area (both upstairs and downstairs) on precinct A, Area A3-A5; and

(b) a list of names and persons to be served with a copy of the application.

[12] The Court can see no evidence an affidavit was filed in support of that application. The documents attached to the application itself include a photograph of the site, with several areas circled and various diagrams with lines and comments attached to them.

Who are the 3rd and 4th Respondents?

[13] In its Oral Decision of 20 October 2016,[1] the Court identifies the respondents at paragraphs [18] to [20]. The 1st Respondent owns the property, and the 2nd Respondent appears to be the 1st Respondent's daughter. It is they who are most affected by the Court Orders requiring decommissioning and reinstatement.

[14] The 4th Respondent is a landlord subject to the orders requiring tenancies to be terminated. This order, A(a) of Decision [2017] NZEnvC 5, is not subject to any application for modification. I conclude that the 4th Respondent can have no direct interest in this application unless it seeks to re-let the premises. That action would be a breach of the undisputed Orders and the relevant Council plan.

[15] The 3rd Respondent asserts inchoate rights to manage and operate the property. He is not the registered proprietor, nor was there any management contract or lease produced to the Court. Overall, it is difficult to see Mr Lau having any legitimate interest in the works required on the property, unless it is to tenant them.

[16] There is nothing in the application to suggest how change or cancellation of the Court Orders will affect either the 3rd or 4th Respondent. If it is to permit tenancies, that is clearly contrary to Orders of the Court, which are not not subject to any application. It would also be a clear breach of the relevant Plan as found by the Court.

Non-compliance with the order

[17] It is clear that the Court's order has not been complied with, and the time for compliance is now well expired. There is no new or different information supplied in this application for change which was not addressed by the Court at the substantive hearing.

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1 [2016] NZEnvC 204.

[18] It is also clear that the intent of s 321 is to allow the Court to consider changes in circumstances in respect of enforcement orders whether made on a temporary or permanent basis. The question is whether this flexibility means that the Court must always proceed to hear a change or cancellation application, even if it is vexatious or an abuse of process under s 279 of the Act.

Abuse of s 279(4) – vexatious, frivolous, abuse of process

[19] It appears that the intent of the application is to either permit the 3rd and 4th Respondents to reinstate connections to the system or to delay the implementation of the Court Orders. Given there are no substantive reasons or affidavit given in support of this application, it would be necessary for the Court to interpolate into the application some reason related to a change of circumstances.

[20] The Council infers that this must be because the Unitary Plan is now operative, and that its status within Precinct A allows for mixed housing. However, as its counsel points out (and as discussed by the Court in its substantive decision) the Unitary Plan does not permit more than one occupied dwelling/residential unit without a resource consent.

[21] Given that this application for change has been filed after the dismissal of the High Court appeal, the Council say it is a reasonable conclusion that this is a vexatious and frivolous application to delay the inevitable. It is clear that the Court Order required compliance no later than February 2017. There is no evidence suggested, even by the applicant, that it has complied with the Orders.

[22] The reasons for change are illusory in referring to precinct A with attached photos. If the activities require resource consent, which the Court concluded it did, there is no evidence that such resource consent have ever been applied for or granted.

[23] The inevitable and obvious conclusion likelihood, from the information supplied, is that Mr Lau is seeking to continue to utilise the house for multiple dwellings, or prevent the removal of the connections if that has not already occurred by the Council. He has not sought either a declaration or a resource consent, and in fact remains non-compliant with all of the Orders of the Court in relation to this matter, including as to costs.

Outcome

[24] On the basis of the information supplied, the proceedings appear to be frivolous and vexatious, and an abuse of the process of the Court. It cannot be the intent that s 321 can be utilised to overcome the finality of Court proceedings, especially when that decision has been appealed to the High Court unsuccessfully.

[25] In the absence of proper affidavits filed showing a significant change in circumstances, the Court is left with clear non-compliance with the Order and no proper basis to consider an application for change. Certainly, none is advanced within the document itself and there is no accompanying affidavit.

[26] Section 318 of the RMA provides that the Court shall hear the parties prior to making an enforcement order. Although this is said to apply to a change or cancellation of an enforcement order pursuant to s 321(2), I am not satisfied that it overcomes the provisions of s 279(4) in relation to vexatious proceedings and abuse of process.

[27] I remain cautious, however, and wish to give the 3rd and 4th Respondents an opportunity to establish grounds for a change or cancellation. If the applicant wishes to maintain the application, they are to file within **five working days** affidavit evidence or submissions demonstrating:

(a) the extent to which they have complied with the Court's order;

(b) the aspects of the decision that have now been changed by virtue of a change of background facts or circumstances (including compliance with the order);

(c) how the objectives of the Plan as discussed in the decisions can otherwise be met; and finally,

(d) whether the applicant can provide any certainty as to costs given the intent of the Council expressed to seek indemnity costs.

[28] In the event that such application is filed within **five working days** the Court directs that the respondent Council shall have a further **five working days** to file any affidavits or submissions in response, including whether it seeks a decision on the papers or a hearing.

[29] The Court shall then conclude whether it will proceed to a hearing or decide the matters on the papers. In the event that it is to proceed to hearing a notice for hearing will be issued forthwith and the matter is likely to be heard on either 16 or 18 August 2017.

JA Smith
Environment Judge