

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision [2021] NZEnvC 059

IN THE MATTER OF

an application for an interim
enforcement order under s 320 of the
Resource Management Act 1991 (**RMA**)

BETWEEN

DAVID AND SUE COLDICUTT

(ENV-2021-AKL-049)

Applicants

AND

WHITEHALL FRUITPACKERS
HOLDINGS LIMITED

Respondent

Court: Environment Judge MJL Dickey sitting alone pursuant to
ss 309(2) and 320 of the Act

Hearing: On the papers

Last case event: Judicial Telephone Conference held 6 May 2021

Counsel: A Webb for the D & S Coldicutt
L Muldowney for Whitehall Fruitpackers Holdings Limited
T Le Bas and D Aquilina for Waipa District Council

Date of Decision: 7 May 2021

Date of Issue: 7 May 2021

**DECISION OF THE ENVIRONMENT COURT ON APPLICATION
FOR *EX PARTE* INTERIM ENFORCEMENT ORDERS**

A: The application for interim enforcement orders is declined.

B: The issue of costs is reserved.



REASONS

Introduction

[1] On 4 May 2021 D & S Coldicutt applied *ex parte* for interim enforcement orders against the respondent, Whitehall Fruitpackers Holdings Limited (**Whitehall Fruitpackers**), in relation to the erection of 6m high screens around the perimeter of its kiwifruit orchard at 714 Maungatautari Road, Cambridge.

[2] The application was accompanied by:

- (a) an affidavit from one of the applicants, D Coldicutt, sworn 4 May 2021; and
- (b) a memorandum of counsel for the applicants, Mr Webb dated 4 May 2021.

[3] The orders sought are as follows:

1. We David and Sue Coldicutt apply for the following interim enforcement orders:
 - (a) pursuant to s314(1)(b) of the Resource Management Act 1991 (RMA) to prevent the respondent from implementing resource consent (LU/0042/21) (Consent) to erect 6m high screens around the perimeter of its kiwifruit orchard to avoid a likely effect on the environment (particularly long-tailed bats) that could be caused by the screens;
 - (b) pursuant to s314(1)(da) of the RMA to prevent the respondent from implementing the Consent to avoid a likely effect on the environment (particularly long-tailed bats) relating to land that the respondent owns and/or occupies: and
 - (c) pursuant to s314(1)(e) of the RMA that the Consent be cancelled because the information provided to the Council contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant Consent.
2. The location for which the interim enforcement orders are sought is 714 Maungatautari Road, Cambridge 3494.
3. The interim enforcement orders are sought against the respondent. Its registered address is Level 3 - PWC Centre, Cnr 109 Ward and Angelsea Streets, Hamilton, 3204 and its agent is Mr Mark Chrisp, c/- Mitchell Daysh, Planning Consultants, PO Box 3240 Hamilton.
4. We apply for the interim enforcement orders to be made on the following terms and conditions:

- (a) that any interim enforcement orders be made on an *ex parte* basis;
 - (b) that all and any work to implement the Consent cease immediately and until further order of this Court;
 - (c) that a copy of this application and any orders made pursuant to this application be immediately served on the respondent and its agent Mitchell Daysh;
 - (d) that a copy of this application and any orders made pursuant to this application also immediately be served on the Waipa District Council (attention Quentin Budd), the Waikato Regional Council and the Waikato office of the Department of Conservation;
 - (e) that an assessment of the potential for adverse effects on long-tailed bats be undertaken by the respondent;
 - (f) the costs of this application be reserved; and
 - (g) such other Orders as this Court sees fit.
5. In support of the application, we attach the following documents:
- (a) an affidavit from David Coldicutt;
 - (b) a memorandum of counsel; and
 - (c) a list of names of persons to be served with this application

[4] No undertaking as to damages was offered on the grounds that “this is a matter of public importance” because of the potential for serious adverse effects on long-tailed bats and alleged deficiencies in the District Plan.¹

Background

[5] On 16 April 2021 the Waipa District Council (**Council**) granted consent to Whitehall Fruitpackers to install and utilise vertical horticultural shade cloths (artificial screens) associated with a permitted farming activity (kiwifruit orchards) in the Rural Zone at its property, being 714 Maungatautari Road, Cambridge.² The Council’s Combined Notification and Decision Report recorded the following:³

The proposal does not provide for screens within the Significant Natural Area identified in the ecology report prepared by Bluewattle Ecology. Further, no

¹ Applicants’ memorandum, dated 4 May 2021 at [16]-[19].

² (LU/0042/21), see summary at page 1 of the Council’s Combined Notification and Decision Report – Annexure A to the Affidavit of DS Coldicutt.

³ Decision of Waipa District Council at page 21.

adverse effects of the proposal on the adjoining ecosystem or long-tailed bats has been identified by Bluewattle Ecology.

[6] Work commenced on erecting the screens on or around 29 April 2021.⁴

[7] The Coldicutts live at 808 Maungatautari Road, Cambridge, and their property shares a common boundary with property owned by Whitehall Fruitpackers.⁵

[8] The Coldicutts' concern is that the erection of the screens will create a serious adverse effect on them and on long-tailed bats.⁶

The grounds for the interim enforcement orders

[9] The Coldicutts' position is that the potential for serious adverse effects on long-tailed bats was not recognised by the Council officer assessing the resource consent application.⁷

[10] Mr Webb submitted that, in deciding whether to grant the resource consent, the Council officer wrongfully misinterpreted the report from Bluewattle Ecology (**Bluewattle Report**) which stated at section 4.1:

The bat survey indicates that the locality is being utilised by long-tailed bats as commuting, foraging and roosting habitat, including the pasture, kiwifruit orchard and associated shelter belts. Consequently, the locality triggers criteria 1, 3, 6 and 11 of Table 11-1 of the WRPS, and hence is ecologically significant in terms of section 6(c) of the Resource Management Act (Table 1 - to be identified as significant an area needs to meet one or more of the criteria). This significance determination includes the identified SNA, pastureland, shelterbelts, exotic trees and horticultural land.

[11] And at section 5 the Bluewattle Report noted:

I do not have any information before me to indicate that the potential adverse ecological effects associated with this proposal have been addressed by the proposed application to utilise artificial screens at 714 Maungatautari Road. The resource consent application report prepared by Mitchell Daysh (2021) does not identify the ecological values of this locality or assess how the proposal may affect these values. The relatively very high and sensitive

⁴ Affidavit of DS Coldicutt, sworn 4 May 2021 at [9].

⁵ Affidavit of DS Coldicutt, sworn 4 May 2021 at [2].

⁶ Affidavit of DS Coldicutt, sworn 4 May 2021 at [4] and [6].

⁷ Applicants' memorandum, dated 4 May 2021 at [3].

ecological values of this locality mean that a robust impact assessment is required for any potential development, particularly for significant habitats of long-tailed bats.

[12] Mr Webb submitted that the Bluewattle Report determined that Whitehall Fruitpackers' property is within a Significant Natural Area (SNA) as it meets three of the criteria in Table 11-1 of the Waikato Regional Policy Statement (WRPS). His submission is that the screens are to be erected within an ecologically significant area and that this was not considered by the Council.⁸

[13] Mr Webb submitted that, as none of the effects set out in the Bluewattle Report were considered in granting the resource consent, s 319(2) of the RMA does not prohibit the Court from making the interim enforcement orders sought. He submitted that s 319(2)(b) of the RMA has not been satisfied because the adverse effects on long-tailed bats and erecting the screens in the SNA were not recognised by the Council officer before granting the consent.

Making an interim order

[14] In terms of s 320(3) of the RMA I am obliged to consider what the effect of not making the order would be on the environment; whether the applicant has given an appropriate undertaking as to damages; whether I should hear from the applicant or any person against whom the orders are sought; and such other matters as I think fit.

[15] The Environment Court has adopted, in general, the approach of the civil courts in New Zealand to the granting of interim injunctions; the Court will normally require the applicant to demonstrate that they have at least an arguable case on a serious question, that the balance of convenience is in favour of making the order sought rather than not making it, and the overall interests of justice require the orders to be made.⁹

⁸ Applicants' memorandum, dated 4 May 2021 at [4].

⁹ *Berhampore Residents Assn Inc v Wellington City Council* (1992) 1 NZRMA 41; *Gulf District Plan Assn Inc v Araraw Properties Ltd* Decision No. A 129/02; *Friends of Sherwood v Auckland Council* [2018] NZEnvC 178 and *Baldock v Auckland Council Community Facilities* [2021] NZEnvC 042.

Making an interim order ex parte

[16] Under s 320(2) of the RMA, an application for an interim enforcement order may be made without notice to the person against whom it is sought and without holding a hearing. These provisions allow for the possibility that the need for action to deal with the contravention of the Act may be so urgent that the usual requirements for notice and a hearing could result in greater environmental damage.

[17] The issue is whether such risk outweighs the general desirability of adherence to the usual procedure of the Court and the principles of natural justice, including in particular hearing both sides to a case before making an order affecting the rights and interests of a party.

[18] On receipt of the application and supporting documents I directed that the application be served on Whitehall Fruitpackers and the Council on a *Pickwick* basis.¹⁰ I also formed the view that it was desirable to convene a judicial telephone conference (JTC) with a representative present for the Coldcutts, Whitehall Fruitpackers and the Council.

[19] The JTC took place on 6 May 2021, during which Mr Webb confirmed that the Coldcutts wish to pursue the application for interim enforcement orders. Mr Muldowney for Whitehall Fruitpackers, advised the Court that the application for interim orders is opposed and that it wishes to be heard in relation to the substantive application for enforcement orders. Ms Le Bas advised that the Council will keep a watching brief regarding the outcome of the application for the interim enforcement orders, though is particularly interested in the order sought at paragraph 1(c) of the application.

¹⁰ Basically, a procedure which is a halfway house between proceeding on notice and doing so *ex parte*. See *Pickwick International Inc (GB) Limited v Multiple Sound Distributors Ltd* [1972] 1 WLR 1213, [1972] 3 All ER 384.

Undertakings as to damages

[20] Mr Webb made the following submissions in relation to an undertaking as to damages:¹¹

16. The applicants have not given an undertaking as to damages.
17. This is a matter of public importance on two levels:
 - (a) the potential for serious adverse effects on long-tailed bats; and
 - (b) alleged deficiencies in the Plan.
18. It is submitted that a requirement for an undertaking in such circumstances is not appropriate.
19. In any event, it is difficult to see what loss could occur if the rection of the screens is halted until this issue is investigated.

[21] Mr Webb was given an opportunity to consult with the Coldcutts concerning their position in relation to the undertaking as to damages following the JTC, but no advice was received from him that they wished to change their position from the one stated in their application and recorded above.

[22] Mr Muldowney submitted, during the JTC, that the screens are needed to deter frost, hail and rain from damaging young and vulnerable kiwifruit vines in the orchard. He advised that there is a real risk to Whitehall Fruitpackers' livelihood if the interim orders are made and the kiwifruit vines are damaged as a result. In this context he submitted that it is appropriate for the Coldcutts to provide an undertaking as to damages.

[23] In this case the Coldcutts have submitted that they have made the application for interim orders as a matter of public interest. However, it is also clear that they have a private interest in the interim enforcement orders being made which is evidenced at [4] of Mr Coldcutt's affidavit where he said:

My wife and I consider that the screens will create a serious adverse effect on us and that those effects have not been properly considered by the Council in approving the resource consent. Based on legal advice, we consider that the notification assessment process was therefore deficient and was unlawful, and

¹¹ Applicants' memorandum, dated 4 May 2021 at [16]-[19].

that the consent is unlawful as well.

[24] Having considered the position of both parties I find that the fact that an undertaking as to damages has not been offered is relevant, although not determinative, in deciding whether it is appropriate to grant the application for interim enforcement orders. I note, however, that:

- (a) the Coldicutts have a private interest in the interim orders being granted and are not solely motivated by matters of public interest;
- (b) if the screens are not erected there may be financial consequences for Whitehall Fruitpackers; and
- (c) Whitehall Fruitpackers has a resource consent to erect the screens.

The effects on the environment

[25] The Bluewattle Report relied on by the Coldicutts does not assert that long-tailed bats will be adversely affected by the screens. It is recorded that there are long-tailed bats in the area, that certain criteria in the WRPS are triggered such as to make the area ecologically significant, and it recommended that an assessment of how the screens may affect the long-tailed bats be undertaken.¹²

[26] In addition, no evidence has been provided that sets out why there is a need for urgent intervention by the Court in issuing interim enforcement orders, with the affidavit of Mr Coldicutt acknowledging that if the screens are erected they can be removed.¹³

If the screens are erected, then of course they can be taken down again, but my wife and I want to act urgently on this issue and do not want any of our rights compromised by delays.

¹² Report by Bluewattle Ecology, dated 8 April 2021, at section 5. I note also reference in the Report to the “loss of this stand of trees” (4.1). Mr Webb was unable to advise me as to what stand of trees this referred to.

¹³ Affidavit of DS Coldicutt, sworn 4 May 2021 at [11].

[27] Given the lack of evidence as to adverse effects on the long-tailed bats from the screens, and the fact that the screens can be removed if required (although I acknowledge that process may be inconvenient and expensive), I find that there is no immediate threat to long-tailed bats or to any other part of the environment established in the application by the Coldcutts that would require the Court to issue interim enforcement orders. Given this, overall justice is served by refusing the orders. The attendant consideration of where the balance of convenience lies relative to the rights of the respective parties, favours orders not being made.

Other matters

[28] Whitehall Fruitpackers has a resource consent to authorise its activity. The Coldcutts acknowledge that the activity is a restricted discretionary activity and that the District Plan does not reserve discretion for the Council to consider any ecological impact of erecting the screens. And:¹⁴

Accordingly, while (sic) the Council has technically considered all matters over which discretion has been reserved.

[29] Despite that, the Coldcutts assert that there will be a serious potential adverse effect that has not been considered.

[30] I have found however, that no evidence of an adverse effect has been provided, I do not therefore need to address the requirements of s 319(2) of the RMA in determining the application for interim orders.

[31] Finally, and for completeness, I note that Mr Webb submitted that the applicants had received expert planning advice that the plan does not give effect to the WRPS.¹⁵ That advice was not provided to the Court.

Decision

[32] The application for interim enforcement orders is declined. Costs are reserved.

¹⁴ Applicants' memorandum dated 4 May 2021 at [5].

¹⁵ Applicants' memorandum dated 4 May 2021 at [11].

[33] A minute setting out an evidence exchange timetable in preparation for the hearing of the substantive application for enforcement orders will be issued by the Court in due course.



MJL Dickey
Environment Judge

