

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision No. [2020] NZEnvC 198

IN THE MATTER an application for enforcement orders under
 section 316 of the Resource Management
 Act 1991 ("the Act")

BETWEEN LAKE ROAD PRESERVATION SOCIETY
 INCORPORATED

 (ENV-2017-AKL-000187)

 Applicant

AND LAKE ROAD QUARRY LIMITED

 First Respondent

AND O'CALLAGHAN HOLDINGS LIMITED

 Second Respondent

AND AUCKLAND COUNCIL

 Third Respondent to application for
 enforcement orders and Respondent to
 appeal

Court: Environment Judge J A Smith
 Commissioner K Wilkinson
 Commissioner J Baines

Submissions: Mr R Brabant for Lake Road Preservation Society Incorporated
 (**Preservation Society**)
 Mr J M Savage for Lake Road Quarry Limited and O'Callaghan
 Holdings Limited (**Quarry Operator**)
 Mr S Quinn for Auckland Council (**the Council**)
 Mr C M Harris in Person (**section 274 Party**)

Date of Issue: 1 December 2020

DECISION OF THE ENVIRONMENT COURT JUDGE J A SMITH

A: This Court makes an Enforcement Order as per **Annexure A** hereto:

LAKE ROAD PRESERVATION SOCIETY INC-v-LAKE ROAD QUARRY LTD & ORS (Decision 20201112)



- (1) Lake Road Quarry Limited and O'Callaghan Holdings Limited are hereby ordered to comply with the Enforcement Order **annexed as A**.
- B. The Court tentatively considers the original resource consent granted in this matter in 1981 is now fulfilled by virtue of all material within the area and within the terms of that consent having been exhausted. It is therefore unclear if any quarry operations are permitted on the site even in accordance with the 1981 consent.
- C. The Court accepts that there is a consent issued by the Regional Council authorising the removal of over-burden and stockpiling on site. There has been no application directly about the legality of that consent in light of the enforcement order in respect to the quarry activity. The quarry holder should seek declarations, if it wishes to exercise the regional earthworks consents, as to whether or not there has been a change of circumstances which effects the resource consent. No further formal order has been sought or could be made at this stage without further information.
- D. The Court makes orders for costs as follows:
- (i) It hereby orders that Lake Road Quarry Limited and O'Callaghan Holdings Limited jointly and severally are to pay to the applicant the sum of \$105,000 in relation to:
 - (a) appeal proceedings: \$55,000
 - (b) enforcement proceedings: \$50,000
 - (ii) The sum may be enforced in the District Court at North Shore if necessary.

REASONS



Introduction

[1] This decision needs to be read in conjunction with and is ancillary to the decision of this Court in respect of an application for resource consent.¹

[2] As part of that decision, the Court considered whether the existing quarry activity was operating in accordance with a consent and also an application for enforcement orders.

[3] The Court concluded that a new resource consent should not be granted and the existing resource consent (the 1981 Consent) was significantly constrained to approximately 2,000 m³ of material a year within a set footprint with Traffic Movements Limited with 1 to 2 trucks per day (a total of 4 movements) during summer months.

[4] Having reached that conclusion, the Court adjourned the matter for further consideration of the application for enforcement orders to:

- (a) Ascertain the scope of the activities that could occur on the site in light of the decision; and
- (b) Whether the parties could reach accommodation as to the orders that should be made, if any.

Subsequent action

[5] There were subsequently continuing issues which required several directions from the Court being dated 25th/26th March, 21st May, 21st July, 28th August and 17th September 2020. There was also a minute of the Court of the 16th June 2020 given the memoranda filed.

[6] The critical memorandum appears to be that from the Preservation Society dated 27th July. In that memorandum the Society sought orders:

- (a) preventing further quarrying on site (including any exercise of the 1981 Consent); and



¹ *Lake Road Preservation Society Inc-v-Lake Road Quarry Limited & Ors* [2020] NZEnvC 27.

(b) The removal of all machinery relating to quarrying on the site.

[7] Although the original application did include an application which involved mitigation and thus the question of remediation, the Preservation Society did not seek to proceed with that in the circumstances. Although the Society considered that there would be significant benefit in some replanting on the bench faces this was not pursued in any detail.

[8] The issue however arises as to whether or not the consent holder is still able to exercise the regional earthworks consent which it obtained to remove over-burden above the quarry and expose new faces and also create benching in the area that was slipping. This also involves stockpiling of materials on site.

The current position

[9] As we understand it the quarry ceased operation at the commencement of Covid-19 level 4 and has not recommenced.

[10] Furthermore, the Company gave an undertaking to the court that it would not recommence the quarrying activity without further order of the court. At this stage, we understand the quarry to be closed and locked but with some machinery, (namely a crusher and perhaps some diggers) still on site.

[11] From our inspection prior to the decision, we are aware that there is a relatively deep hole which was being used to access the mine floor of the quarry close to the area that is slip-prone and on which the over-burden was sought to be removed. Without constant pumping we suspect that hole will either fill naturally or through ground water, but we have no up to date information on that.

[12] Furthermore, we also suspect that the over-burden which has already slipped significantly will continue to slip in part filling the hole and also creating slip piles at the base of the quarry face beneath. The Council has not raised any particular health and safety issues about the site remaining unused, but we would have thought that some level of checking of fences to prevent people being injured by rock fall or within the deep quarry area may be useful. However, that is not a matter directly the subject of any application or jurisdiction by this Court.



The orders now sought

[13] Although Lake Road Preservation Society had a widely based application for enforcement orders, the form of orders they now seek is annexed hereto and marked **A**. Mr Brabant goes into a number of reasons in his memorandum of 27th July 2020 as to why the Society has not pursued the rehabilitation issue².

[14] The major concern appears to be the use of machinery to work benches on the upper part of the site and the potential for visual impacts from that. Although Mr Brabant notes that there is the potential for the benches (which are already rock strewn from slips) to be improved by mulching and planting, he acknowledges that this itself is an issue that may involve further works. For our part, we consider that it would also raise issues of health and safety and would require a reasonably comprehensive approach to access to the slopes for the purposes of revegetation.

Is the 1981 consent still alive?

[15] Whilst we acknowledge that the 1981 consent has not expired, we have considered further the question as to whether or not there are any materials still covered by that consent to be extracted and utilised. We also acknowledge that Mr Savage says that the volumes and conditions imposed mean the consent is not of any practical consequence.

[16] For our part we consider, tentatively, that the footprint that was originally included within the 1981 consent is an area that has now been fully exploited for rock. The quarry face itself is well beyond the bounds of this footprint and earth mounds and storm ponds are also outside the footprint originally envisaged. In practical terms we consider that the 1981 consent has reached the end of its life through the exhaustion of material the subject of the application. The consent was for material which is finite and the consent appears to have been completed and thus fulfilled. Without a consent for the extraction of materials, the question then arises as to whether or not the earthworks consent can operate independently.



² Minute of the Environment Court of 16 June 2020, at [9].

Are the earthworks consent independent?

[17] We have had to consider this matter in a practical way. In the end we have concluded that we are not required to reach a firm conclusion on this matter because:

- (a) The applicant for enforcement orders does not seek a decision on the point;
- (b) In any event, it would require a more detailed application as to the exact issue to be determined and evidence to support that proposition; and
- (c) It would require a further consideration by the Court on legal submissions.

[18] We do think that we should record that the continued utilisation of the regional earthworks consent to achieve further benching on the upper slopes of the quarry seems problematic given that its purpose was to expose further aggregate and the consequences of that activity may have significant adverse effects.

[19] We conclude that the safe course is to note that before undertaking any rehabilitation in accordance with that consent, the Applicant should consider applying for either a declaration from this court or a resource consent from the Council for such works which could be notified and then considered by the Council and the Court on appeal if necessary.

[20] Given the position of the Preservation Society, it seems likely that any utilisation of that regional earthworks consent would lead to further applications for declaration and/or enforcement orders. However, we do not consider that we are currently in a position to make a final ruling on this issue and it was not the focus of the hearing before us previously.

The scope of any orders

[21] Given our view that the 1981 consent has now been fulfilled, ie., all material extracted, it appears to us that we can make relatively simple orders for enforcement. Those sought in Appendix A are relatively straight forward. We also agree with the Applicant that any plant and machinery involved in the quarry activity should properly be removed.



[22] We wish to limit the enforcement orders in this way because there may be permitted activities in relation to vehicles such as trucks, tractors and the like which are permitted activities and are permitted irrespective of the quarry activity. We conclude the wording proposed is sufficiently clear in this regard and that general vehicles that are to be utilised for permitted activities on the site can remain. We do not understand permitted activities to include general machinery storage.

[23] Furthermore, we consider that we should include a clause similar to that we have just discussed:

- (a) advising that the exercise of the 1981 consent is no longer appropriate as it has been fully utilised.
- (b) that the utilisation of the regional earthworks consents in the absence of the quarrying activity is unclear.
- (c) we intend to note that either a declaration or resource consent may need to be obtained. We appreciate this is advice rather than any form of order, but we consider it should be included to clarify our concerns for the parties for the future.

[24] Finally, we do wish to note that there are permitted activities which can occur on this property and it is likely that some of those may generate effects. It is also possible, of course, that an application for resource consent for another activity may be sought and obtained. We do not suggest that these orders form a planning blight on the site that prevents other permitted uses or other consented uses from occurring.

[25] We also note that we have made no determination (nor do we, at this stage) as to whether or not the benching and/or remediation of the quarry should be undertaken or if so in what way. Again, we conclude on the basis of the evidence to date that this would probably require further resource consents from Council. We make no further comment on the existing earthworks consent at this stage beyond that already discussed.



Outcome

[26] We therefore conclude:

- (A) Lake Road Quarry Limited and O'Callaghan Holdings Limited are hereby ordered to comply with the enforcement order annexed as A.
- (B) The Court tentatively considers the original resource consent granted in this matter in 1981 is now fulfilled by virtue of all material within the area and within the terms of that consent having been exhausted. It is therefore unclear if any quarry operations are permitted on the site even in accordance with the 1981 consent.
- (C) The Court accepts that there is a consent issued by the Regional Council authorising the removal of over-burden and stockpiling on site. There has been no application directly about the legality of that consent in light of the enforcement order in respect to the quarry activity. The quarry holder should seek declarations, if it wishes to exercise the regional earthworks consents, as to whether or not there has been a change of circumstances which effects the resource consent. No further formal order has been sought or could be made at this stage without further information.

Costs

[27] This issue of enforcement orders followed from the outcome of the earlier hearing. It was acknowledged that if the applicant did not succeed in obtaining a resource consent for the activity then some form of enforcement orders might be appropriate. The Court, reaching its finding that the resource consent should not be granted and that there was no existing resource consent for quarrying gave the parties an opportunity to resolve the balance of the issues. It appears that has not been possible, and the form of orders now sought are well signalled within the original application.

Should there be an award of costs?

[28] We have concluded unanimously that there should be an award of costs. This is a clear-cut case where the Applicant was operating well outside the terms of their



resource consent and knowingly continued that once the issue was raised by the Society. After continual complaint, the Applicant applied for a resource consent to allow the activity but took some considerable time to progress that Application.

[29] We have concluded that the Society was entirely reasonable in filing the application for enforcement orders given the delays in progressing the consent application. We acknowledge (as does the Lake Road Preservation Society) that Mr O'Callaghan came into this situation very late just prior to the hearing before the Court. Nevertheless, issues between Mr O'Callaghan and the former consent holder are ones that could have been the subject of contract or could be the subject of separate action.

[30] For our part, we conclude that Mr O'Callaghan's decision to substitute for the original party was taken in the knowledge that these proceedings were well advanced and if unsuccessful orders for costs could be made. We do not consider that the change of Applicant is a ground for modifying any orders for costs. We see the action as a unified action by the Quarry Operator and therefore costs should be awarded on this basis.

[31] This was an appeal for refusal of resource consent and required Mr O'Callaghan and his associated companies to actively continue the appeal. In our view this is a strong case made out for the application of costs and we now turn to the question of quantum.

Quantum of Costs

[32] There is a high degree of commonality between the issues raised by the Preservation Society on the application for consent and those directly relevant to the enforcement order.

[33] We have concluded that the Applicant having chosen that method to progress the argument, ie., seeking a full consent for the future and arguing the existing consent as part of that, is a matter for their choice but those costs should not be visited upon the Preservation Society.

[34] To that end, the costs of the Society preparing for the appeal and the enforcement matter together should be seen as the same issue. If those are higher than the cost of proceeding with the enforcement order only, then that is entirely the responsibility of the Quarry Operator in choosing to seek retrospective legitimacy for the quarry.



[35] The Society incurred costs of the appeal:

(a) \$115,195 (incl GST) made up of:

- (i) Legal Fees: @ \$ 70,000 (incl GST)
- (ii) Expert Fees: @ \$ 45,000 (incl GST)
\$115,000 (incl GST)

(b) They incurred costs on the enforcement application:

- (i) Legal Fees: @ \$83,000 (incl GST)
including partial attribution of fees.
- (ii) Expert Fees: @ \$18,000 (incl GST)
\$101,000 (incl GST)

[36] Of those sums the Preservations Society seeks:

- (i) @ \$55,000 or around 48 percent of application
- (ii) @ \$60,000 or about 60 percent of enforcement

The Preservation Society also seek a further 20 percent or \$20,000 from the Council.

[37] Overall, they seek close to 50 percent of costs on the appeal and nearly 80 percent on the enforcement proceedings.

[38] The parties discuss a normal range for costs on appeal between 25 percent and 33 percent. With respect, we consider that this is a misnomer. We accept that this is the usual outcome of application for costs where orders are made in respect of appeals. There are of course cases where more significant orders for costs are made. This is one of those cases where the issues in relation to the enforcement matters (ie., the validity of the existing consent), were essential to determination of the scope of the application for it and whether a retrospective consent should be allowed.



[39] Given the refusal at first instance of a consent and the application for enforcement orders it was extremely clear to the applicant on appeal that they would have to establish legitimacy of the quarry to argue that it was part of the existing environment.

[40] Notwithstanding several quarry witnesses seemed to approach their evidence on the basis that the quarry activity was part of the existing environment. We also acknowledge that the general reliance on the Council to defend its position is a matter that the Society was particularly concerned about given its effects on the members.

[41] Since the application was modified it appeared that the Applicant's position was that it was reaching a possible accommodation with the Council. To that end the Preservation Society did not agree with that approach and had to produce its own experts.

[42] We particularly conclude that the evidence of Mr Stephen Brown was of some particular importance in this case. We note in particular at paragraph [29] the Committee had discussed Mr Pryor's evidence and suggested the Quarry was an existing feature of the visual catchments surrounding the site. We noted at paragraph [34] the Committee's discussion at paragraph [119] was concerned at the reference to "replacement consents".

[43] This is repeated in our analysis of the Commissioner's approach at paragraph [37] and the Court went on to consider the relevance of the changes now adopted. In this regard the Court clearly preferred the evidence of Mr Brown. This was a visual input and the history on the site including helpful photographic evidence. We quoted particularly from Mr Brown's evidence at paragraph [138] to [139].

[44] Overall, we conclude that this is a case which does justify a significantly higher award of costs than the usual outcomes for the reasons we have just explained. Mr Brabant seeks a payment of some 48 percent of the appeal costs which in the circumstances we consider is the appropriate outcome.

[45] Overall, we have concluded that an award of \$55,000 costs in relation to the appeal proceedings is an appropriate award presenting something in the order of 48 percent incurred.

[46] The Preservation Society also seeks an order against the Council in the sum of 20 percent or \$20,000 contribution to its costs. (We agree that the Council defended its



position at hearing on the decision and that no order of costs is appropriate in respect of the appeal itself).

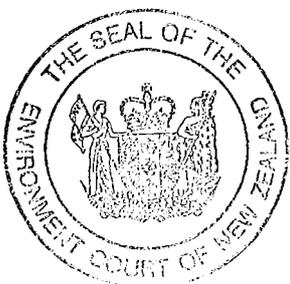
Costs against Council

[47] In relation to the enforcement proceedings it must be said that the role of the Council was simply as the relevant enforcement authority. There is a long stream of cases establishing that the Council has discretion as to how it can approach these matters. There are some aspects of the actions of the Council which are of concern (the long-term lack of engagement by the Rodney District Council in respect of whether there was a Consent and the subsequent delays by the Unitary Authority). However, this Court has particular difficulty in visiting upon the current authority some of the actions by the Rodney District Council and by the Auckland Regional Council undertaken many decades ago.

[48] It is well established that there must be some action of the Council which can be considered blameworthy to justify the award of costs in such circumstances. Mr Brabant argues that there was a long history of correspondence with the Council which I understand to be the Rodney District and subsequently the Auckland Council. There is some issue as to the terms of the joinder of the Council to the proceedings (it was not originally a party) and a comment by the Court that it was not joined in order to penalise it for any failure to enforce its plan. Mr Brabant goes on to indicate that the Council was not an active party in the enforcement proceedings. That is a fair summary of the position.

[49] While there may be criticism of the action of the Council (particularly, the Rodney District Council) in failing to investigate numerous complaints it received including from legal counsel, I am not able to draw the bow that Mr Brabant suggests that there has been a failure and deliberate avoidance by the Council of its duty. In fact, it seems to be agreed that the reason that the application for consent was made was because of impending action by the Council in respect of the non-compliance and increasing concerns as to its legality.

[50] In the end, the Council has a reasonable discretion in the way in which it enforces its Plan. It cannot be said that they have acted with any particular distinction nor can it be said that their actions in the circumstances are in any way negligent or blameworthy. Accordingly, we conclude that there should be no order of costs as against the Council.



Enforcement Costs as against the Respondents

[51] The applicant seeks orders for costs on the enforcement proceedings as against Lake Road Quarry and O'Callaghan Holdings Limited. In this regard Nampara Holdings Limited is the First Respondent to the Application for Enforcement Orders. Lake Road Quarry Limited and O'Callaghan Holdings Limited are the Second Respondent. The memorandum filed in respect of the Enforcement Orders was for Lake Road Quarry Limited and O'Callaghan Holdings Limited. Similarly, the cost applications on the Enforcement Orders are sought only against the Second Respondent. The Memorandum for Orders appears to refer to Lake Road Quarries Limited, and we assume relates to the Second Respondent, Lake Road Quarry Limited and O'Callaghan Holdings Limited.³

[52] This is certainly the party against whom the draft orders are sought. We can only therefore assume that the Applicant is seeking costs only against the Second Respondent and not against the First Respondent in this regard.

[53] They have claimed costs in the sum of 60 percent of the actual costs incurred. In relation to enforcement orders, it is generally accepted that these may incur higher costs given there is an action taken by an applicant. In a case such as this the outcome is clear and there is justification for orders. We have already concluded that orders should be made in this case.

[54] When we come to consider quantum, there is a wide range of outcomes that the Court will impose. It could not be said that the normal outcome range of 25 percent to 33 percent is appropriate here, although some orders are made in this range. In this case we have already accepted that there is a degree of inter-connection between the Appeal proceedings and the enforcement proceedings. We have concluded that this remedies to some degree the percentage of costs that should be awarded.

[55] When we look at the matter in the round, we have concluded that we should make an order of \$50,000 being approximately 50 percent of the costs incurred. This marks this out as being a reasonably serious and clear case.



³ Memorandum of counsel for Lake Road Preservation Society Incorporated of 27 July 2020, at [6].

Total of costs

[56] Overall, we conclude that a payment of \$105,000 towards the incurred costs of some \$220,000 is an appropriate contribution to the costs of these proceedings.

[57] Overall, we conclude that the actions of the Society were reasonable and the witnesses they called were germane. There could be some argument as to repetition of witnesses, but it was important in the circumstances of the case to understand the different aspects of visual impact over a wide-range of this particular area.

[58] We acknowledge that the Applicant modified its application through the process. In the end, it can seek no particular reduction for that because the Society established that it did not have a legitimate consent.

[59] The enforcement application was justified and the costs reasonable.

Outcome

[60] The Court makes orders for costs as follows:

i) It hereby orders that Lake Road Quarry Limited and O'Callaghan Holdings Limited jointly and severally are to pay to the applicant the sum of \$105,000 in relation to:

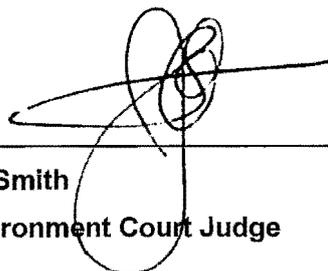
(a) appeal proceedings: \$55,000

(b) enforcement proceedings: \$50,000

ii) The sum may be enforced in the District Court at North Shore if necessary.

[61] There is no order for costs for or against the Council. This concludes this matter.





J A Smith
Environment Court Judge



CAUTION:
 1. This plan is a copy of the original plan.
 2. It is not to be used for any purpose other than that for which it was prepared.
 3. It is not to be used as evidence in any court of law.
 4. It is not to be used as a basis for any claim or demand.
 5. It is not to be used as a basis for any action or proceeding.
 6. It is not to be used as a basis for any contract or agreement.
 7. It is not to be used as a basis for any other purpose.
 8. It is not to be used as a basis for any other action or proceeding.

AREAS SHOWN AS CONSENTED ARE APPROXIMATE ONLY AND WERE CONSENTED UNDER TP1001

COMPRESS PLAN 425557

LAKE ROAD PRESERVATION SOC. LAKE ROAD, TE ARAI	
CONSENT PLAN FOR QUARRY ON LOT 1 DP 406718	
DATE	JANUARY 2010
SCALE	1:5000 BAS
NO.	15251
REV.	V1
APP.	A

A



LAKE ROAD QUARRY APPEAL - EVIDENCE OF STEPHEN BROWN: PLAN SHOWING CONSENTED QUARRY & OVERBURDEN AREA 1981
 Brown NZ LTD
 (April 2010)

