BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 18

IN THE MATTER	of Resource Management Act 1991 (**RMA**) and in the matter of a notice of motion under s87G requesting the granting of resource consents to Waiheke Marinas Ltd to establish a marina at Matiatia Bay, Waiheke Island in the Hauraki Gulf
BY	WAIHEKE MARINAS LIMITED ("**WML**") (ENV-2013-AKL-000174) Applicant

Court: Principal Environment Judge LJ Newhook sitting alone

Counsel or Representative: K R M Littlejohn for Direction Matiatia Inc (**"DMI"**)
B Parkinson for K Lewis and T Greve
M C Allan for Auckland Council
Registrar of the Environment Court on behalf of the Crown

Date of Decision: 9 February 2016

Date of Issue: 9 February 2016

DECISION OF THE ENVIRONMENT COURT ON APPLICATIONS FOR COSTS

A. Costs awarded to DMI in the sum of $198,848.00.

B. Costs awarded to K Lewis and T Greve in the sum of $10,914.20.

C. Costs awarded to Auckland Council of $530,423.96.

D. Costs awarded to the Crown of $427,404.33.

(All sums inclusive of GST).

Introduction

[1] In decision number [2015] NZEnvC 218, the Court refused the notice of motion by WML seeking consents to establish a marina at Matiatia Bay, Waiheke Island.

[2] Applications for costs have been received from direction Matiatia Inc, a major entity that represented the majority of the s274 parties (there were 310 such parties in total); K Lewis and T Greve, Auckland Council, and the Crown. Three of the four applications seek an award of a very significant sum.

[3] The processing of these applications has confronted a slightly unusual circumstance. On 6 January 2016, apparently in consequence of the decision of the Court refusing the notice of motion, WML resolved placed itself in liquidation.

[4] After apparently providing the liquidator with information and advice that he was entitled to take steps to oppose the applications for costs, senior and junior Counsel for WML, Mr R Brabant and Mr J Brabant, sought leave of the Court to withdraw as Counsel due to absence of instructions from the liquidator.

[5] On 5 February 2016 I issued a Minute recording that I doubted that such leave was necessary, but in case it was, I granted it.

[6] In that Minute I also recorded the circumstances in which it appeared that the liquidator was taking no steps to oppose the applications for costs, but was nevertheless calling for proofs of debt to be lodged with him by 10 February 2016. I recorded the following matters and directed that the Minute be served on the liquidator as well as the parties:

[4] The Crown, through the Registrar of the Court, has endeavoured to contact the liquidator to ascertain whether he wishes to discuss processes around issues of costs to the Crown. The Registrar has received no response.

[5] Messrs Brabant have recorded in this week's memorandum, that Mr R Brabant has communicated with the liquidator Mr Whittfield by email on several occasions during January 2016, making him aware of costs applications lodged by Auckland Council and s274 parties; also that the Brabants were on the Court record jointly as Counsel for WML; and that as liquidator Mr Whittfield needed to resolve the question of legal representation (if any) with respect to the claims for costs.

[6] Messrs Brabant further recorded that Mr Whittfield had requested that the Court be advised that he had been appointed liquidator and that all further correspondence should be addressed to him (he indicated that he would also personally communicate with the Court in this regard).

[7] Messrs Brabant advised that no further instructions had been received by them from the liquidator.

[8] Mr Whittfield has communicated with the Court. On 26 January 2016 Mr Whittfield wrote to my Hearings Manager confirming that on 6 January 2016 he was appointed liquidator of the company, and that he was in receipt of "various documents in relation to the application for costs". He then simply recorded that he was attaching a copy of his first report as liquidator, and a claim form.

[9] The final paragraph of the report indicates that "all proofs of debt must be submitted by 10 February 2016". A proof of debt form accompanied the report.

[10] I infer that the liquidator has been offered opportunity from 3 sources (Messrs Brabant, the Registrar of the Court, and my Hearing Manager), to engage in issues concerning claims for costs, and that he has chosen to do nothing other than await proofs of debt.

[11] I have no knowledge of whether parties would be legally or factually disadvantaged in endeavouring to prove debts if the Court were not to make orders for costs by the 10th February to enable them to lodge proofs of debt by that date.

[12] If the liquidator wishes to disabuse the Court of the inference that he does not wish to lodge submissions concerning the costs claims, he should do so immediately. Otherwise I shall have to consider whether I will process the costs applications that are now before the Court and issue urgent decisions, which will be no mean feat given the intervening long holiday weekend.

[13] I imagine that if the liquidator were suddenly to advise that he wished to take active steps to resist the costs applications, he would need to move the proof date back sufficient time to accommodate that process, and allow for the Court to issue decisions after considering the arguments; then also giving claimants time to lodge proofs of debt (should awards be made).

[14] I give notice to the liquidator that if by 10.00am on Tuesday 9 February 2016, the Court has not received persuasive input from him to

> the contrary, the Court will endeavour to proceed to issue urgent costs decisions.

[7] The liquidator responded by email to my Registry staff dated Saturday 6th February, received by me this morning, 9 February. He advised that he would not be making any representation to the Court about the applications for costs, or instructing counsel. He commented that whist having nominated 10 February as the date for proofs of claim to be lodged, he was aware of the costs claims, and recorded that he had an obligation to receive any claims after that date relating to this matter as he was aware that they could crystalise at a later date. Having prepared this decision over the weekend I have proceeded to issue it today, 9 February, in any event.

Principles Applying to Costs on Direct Referral

[8] This decision will effectively deal with three kinds of costs claims, first the claims by s274 parties, secondly that by the Council, and thirdly that by the Crown.

[9] Under s285 RMA the Environment Court has a broad discretion to order any party to pay costs to any other party to the proceedings. Section 87G(5) provides that Part 11 of the Act – which includes s285 – applies to direct referral proceedings under s87G.

[10] The principles applying to costs awards in direct referral proceedings have previously been considered in decisions of the Environment Court – ***Road Metals Company Limited***[1], ***Canterbury Cricket Association Incorporated;***[2] and ***Skydive Queenstown Limited.***[3] Each of these cases considered matters in relation to awards of costs to s274 parties.

[11] In those cases the Court held, in summary, that the general principles for awards of costs apply in relation to applications for costs on direct referrals. The general principles include:

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[1] [2013] NZEnvC 94.

[2] [2014] NZEnvC 106.

[3] [2014] NZEnvC 186.

(a) Section 285(1) confers a broad discretion on the Environment Court to award costs to any party, with the requirement that they be reasonable.[4]

(b) An award is imposed to compensate what is just, not to penalise.[5]

(c) Orders for payment of costs are commonly made against a party who has put another party to unnecessary cost.[6]

(d) The factors in ***Bielby*** apply to the consideration of costs above the "normal range".[7]

[12] Subsections 5, 7 and 8 of s285 RMA set out special criteria for costs on direct referrals. Given the date at which the WML application was lodged, subsections 7 and 8 have not taken effect having regard to the transitional provisions, although I shall have more to say about the flavour of them shortly. Section 285(5) provides as follows:

> (5) In proceedings under s87G ... the Environment Court must –
> (a) When deciding whether to make an order under subsection (1) or (3) –
> (i) Apply a presumption that costs under subsections (1) and (3) are not to be ordered against a person who is a party under s274(1); and
> (ii) Apply a presumption that costs under subsection (3) are to be ordered against the applicant; and
> (b) When deciding on the amount of an order it decides to make, have regard to the fact that the proceedings are at first instance.

[13] It is pertinent to consider the meaning of the words *"have regard to the fact that the proceedings are at first instance."* The three cases cited differ slightly in their findings, ***Road Metals*** and ***Canterbury Cricket*** take one view, and ***Skydive*** a rather different interpretation.

[14] In ***Road Metals*** the Court noted the direct referral proceedings require a significant degree of preparation and argument, offering four reasons.[8] The Court concluded:[9]

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[4] *Thurlow Consulting Engineers & Surveyors Limited v Auckland Council* [2013] NZHC 2468 at [31].

[5] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* [1996] NZ RMA 385.

[6] *Quail Rise Estate Limited v Queenstown-Lakes District Council*, Decision No: A 134/2009 at [59].

[7] *DFC NZ Limited v Bielby* [1991] 1 NZELR 587.

[8] At para [20].

[9] At para [22].

> I agree that there is no presumption that costs will be awarded in favour of affected parties on a direct referral. Nevertheless, given that it is a hearing at first instances and that the level of evidence and amendment is so significantly greater than the District Council hearing, I suspect that costs might be awarded in appropriate cases. This is similar to cases such as enforcement cases, where parties sometimes have no option but to participate.

[15] In ***Canterbury Cricket***, the Court brought into this account some further factors, including that[10] in proceedings where any right of appeal is limited to points of law, it was imperative that the application, together with the assessment of environmental effects and the evidence to be called in support, be thoroughly prepared. The Court also noted[11] differences in scope and conduct of the first instance hearing by the Environment Court compared with an appeal, concluding that the differences might have costs implications:

> A first instance hearing before the Environment Court may be a lengthier process involving more parties with the full range of issues (legal issues, factual and opinion evidence) yet to be determined. On appeal, the Environment Court has the advantage of hearing de novo an application that has been thoroughly explored and tested before a consent authority. Even where an appellant seeks to decline a grant of consent, the parties will usually be able to confine the matters in issue.

[16] The Court in ***Skydive*** expressed doubt[12] that the comparison made with enforcement proceedings would be a principle of general application, and also observed[13] that the direction in s285(5)(b) "*is rather gnomic: it is unclear whether the direction militates for or against costs awards, or increases or decreases them*". The Court held[14] that the general costs principles developed under s285 continue to apply, with their requirement to have regard to the fact that the hearing is at first instance tending *"to reduce the likelihood and/or quantum of a costs order"*.

[17] I am not particularly persuaded of the relevance of a comparison with enforcement proceedings, but strongly concur with the observations of the Court in ***Canterbury Cricket*** at para [11] as quoted above. I do agree with the observations of

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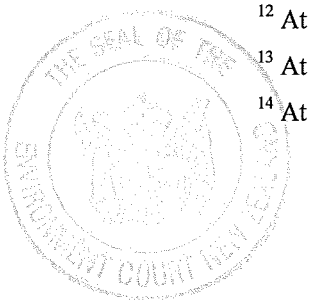
[10] At para [30].

[11] At para [11].

[12] At para [22].

[13] At para [17].

[14] At para [25]



the Court in ***Skydive*** about the general principles continuing to apply under s285. But while I agree that the wording in s285(5)(b) is rather "gnomic", I do not agree that the tendency driven by the provision would be to reduce either likelihood or quantum of costs. I consider that the provision indicates that there might on occasion be an increase, and on others a reduction. The presence of one or other such factor, and the likelihood of an order, will depend on the circumstances of each case, a principle that underpins the costs regime in the Environment Court. As to whether there will be an increase or a reduction, the circumstances of each case will dictate, but there may often be an increase for the reasons identified in ***Canterbury Cricket***.

[18] Counsel for both DMI and Lewis & Greve placed emphasis on the presence in this case of ***Bielby*** principles, well recognised as being as follows:

(a) Where arguments are advanced which are without substance.

(b) Where the process of the Court is abused.

(c) Where the case is poorly pleaded or presented, including conducting a case in such as manner as to unnecessarily lengthen the hearing.

(d) Where it becomes apparent that a party has failed to explore the possibility of a settlement where compromise could reasonably have been expected.

(e) Where a party takes a technical or unmeritorious point [of defence].

Application of the Principles

Application by DMI

[19] Mr Littlejohn lodged a comprehensive submission seeking, based on some of the ***Bielby*** principles, that DMI should be awarded 50 percent of the sum of $397,695.79, that is $198,848.00.

[20] Accompanied by full copies of invoices for costs incurred, rendered by Counsel and experts, together with a spreadsheet, and some appropriate concessions

deleting preliminary costs of approximately $16,000, Mr Littlejohn made a cogent case for such award.

[21] He submitted that the costs incurred were entirely reasonable in the circumstances of the proceeding, which concerned a major proposal in a very public location that would affect the main entry bay to Waiheke forever and impact on all residents and visitors to the Island in one way or another. Importantly, he reminded the Court that DMI had been the principal party representing an extensive number of local submitters who became parties under s274.

[22] Mr Littlejohn submitted that DMI had participated in a focused way in the proceedings, with the benefit of the best advice and counsel it could obtain (senior counsel throughout most of the life of the case was Mr Casey QC). The proceeding involved:

- Extensive pre-hearing work by DMI to organise the multitude of s274 parties for the hearing to ensure it could be managed efficiently and cost effectively;
- Detailed evidence preparation (expert, Maori values, and lay);
- Multiple site visits;
- Extensive expert caucusing;
- One three week substantive hearing (in Auckland and on Waiheke Island);
- An interlocutory motion (following an 11th hour amendment to the application) and a further one day hearing on the legality of that amendment; and
- Review of a revised application in preparation for an attendance at a further week of hearing in Auckland.

[23] In relation to the ***Bielby*** principles, Mr Littlejohn submitted:

(a) The direct referral application was initiated by WML, and submitters had no ability to oppose the notice of motion to refer its consent applications to the Environment Court.

(b) Accordingly, as a submitter wishing to have its say on the proposal, DMI was bound to prepare its case in the manner anticipated by the Court; to engage Counsel; and to present expert evidence. WML ought to have been on notice that this degree of engagement (and its associated costs) would necessarily follow from proceeding by way of direct referral (in contrast to a two-step hearing process); and that any decision was final save for any appeal on points of law.

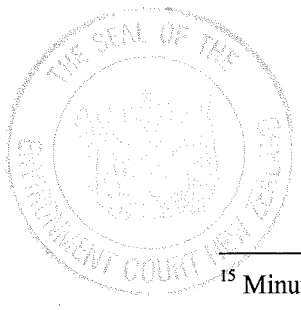
(c) Contrary to what might be expected with a direct referred application, WML approached its application in an iterative and ill-conceived fashion:

(i) It first applied to undertake a reclamation for car parking for 160 berth holders as a non-complying activity.

(ii) When the proposed Auckland Unitary Plan was notified making new marinas non-complying at the proposed location, after the application had been lodged, WML sought to vary its application to propose a suspended concrete deck for car parking (a discretionary activity) in an attempt to retrospectively use s88A of the Act as a shield from the new rules; but it also maintained its application for a reclamation. Furthermore the entire point became moot because WML abandoned its reclamation entirely; also the Court ruled that such reliance on s88A was impermissible.

(iii) After 13 and a half days of hearing, and before all parties had concluded their evidence, WML announced that it proposed to abandon any reclamation or concrete deck for parking and that it would find a land-based solution for car parking. This bombshell was followed by the Court's frank indications to WML of other shortcomings in its proposal that it might wish to consider if it was intending to progress with a redesign at this late stage.[15]

(iv) WML then provided details of its application amendment to provide car parking – a condition precedent to construction,



[15] Minute of the Court after Conference on 23 and 24 October 2014, dated 30 October 2014.

requiring it to do so somewhere in the vicinity, but with no location actually identified; DMI challenged the legality of the amendment and after a day of interlocutory hearing, the Court issued a decision agreeing that the revised proposal was out of scope.

(v) WML amended its application again, reducing and modifying its marina footprint, abandoning any reclamation and dredging, but reinstating a concrete deck for parking; a further week of hearing followed.

(d) This iterative approach to the application added to the legal issues involved in the case and added six more days of hearing (plus associated preparation) that would not have been incurred if WML had properly understood the legal bounds of its ability to vary, and had planned its application accordingly. As recorded in the Court's decision[16] this led the proceedings into a tortuous course over many months.

(e) WML was ultimately unsuccessful, even with its reduced proposal, on key effects and planning issues raised by DMI, particularly landscape, natural character, visual effects, recreation planning, navigation, and resource management issues. That the Court held less store by other issues of transportation, ecology and archaeology.

[24] Mr Littlejohn identified, correctly in my view, that previous Environment Court decisions have clearly articulated the standard expected of an Applicant on direct referral, as I have mentioned above. He then submitted that this was a case for application of that principle, and WML's presentation fell well below the standard expected. I agree with that submission, for the reasons that he advanced as I have just discussed.

[25] Mr Littlejohn correctly recorded that awards of costs in the Environment Court essentially fall into three broad categories, first a "comfort zone" of 25-33 percent of actual costs incurred; higher than standard costs in ***Bielby*** situations; and

[16] At para [7].

indemnity costs which may be awarded in exceptional circumstances. He sought an award of costs in the middle or ***Bielby*** category, and for reasons already traversed I consider that he was right to do so.

[26] I have not had the benefit of submissions in opposition to those of Mr Littlejohn (or indeed those of the other claimants) so therefore I have made a point of considering all submissions most carefully, attachments involving proof of items claimed, and the cases cited.

[27] I award costs in favour of DMI of $198,848.00, GST inclusive.

Application by Lewis & Greve

[28] Ms Parkinson stressed that her clients had offered a very focussed case, addressing only the ecological effects of the proposal. She reminded the Court that her legal submissions, and questioning of witnesses, reflected that focus, in particular the effects of antifouling paints from boats likely to be moored in the marina.

[29] Ms Parkinson noted that her clients' case had been supported by evidence from an expert witness, but that the Court had not held much store by that, hence she was making no claim in relation to that expense. I believe that to be a proper concession.

[30] Ms Parkinson noted that in the early stages of the case WML had resisted the legal proposition that conditions of consent could control the effects on the environment of antifouling paints of boats in a marina, but had subsequently engaged (appropriately) in putting forward detailed conditions of consent on that topic.

[31] Ms Parkinson stressed the unnecessarily tortuous course of the proceedings and submitted, I consider correctly, that having chosen to forego the option of a first instance Council hearing, it missed an opportunity for many issues to become refined from such process, and put the parties to added expense accordingly. She stressed the findings in the ***Canterbury Cricket*** decision on this point.

[32] Based on ***Bielby*** principles, Ms Parkinson sought on behalf of her clients, one half of $21,828.40 as supported by invoices she exhibited. After careful consideration needed of all this necessitated by want of involvement in the costs claims by WML, I award Lewis and Greve the sum of $10,914.20 (GST inclusive).

Application by Auckland Council

[33] The position of Auckland Council as regulatory authority to whom the consent application had been brought in the first instance, was said by its Counsel Mr Allan, to be somewhat different. Mr Allan lodged a comprehensive memorandum, inclusive of supporting invoices and spreadsheet, seeking one hundred percent of costs incurred by the Council, a sum of $533,663.96, comprising external legal costs, costs of external expert witnesses, and costs of the Council's in-house expert witnesses.

[34] The day after he lodged submissions in support of that claim, Mr Allan very properly lodged a short supplementary memorandum advising that it had come to his attention that an invoice rendered by a witness, the Deputy Harbour Master for Auckland, in the sum of $3,240.00, had actually been paid directly by the Applicant to the Auckland Council, thus reducing the council's claim to $530,423.96.

[35] Mr Allan took the trouble to offer submissions about the effect on the costs claims of WML going into liquidation prior to this point. He submitted that having regard to s248 of the Companies Act 1993, the commencement of liquidation would not prevent the Environment Court from considering and determining any costs applications against the Company in liquidation as Applicant in circumstances where the Court had issued a final substantive decision prior to liquidation. He submitted, citing authority, that costs are a consequence of the proceedings and the Court is not

prevented from making a costs order by the fact of liquidation.[17] I agreed with those decisions, and comment in particular in relation to s248(1)(c) that an Applicant for costs is neither commencing or continuing legal proceedings against the Company in relation to its property, or exercising or enforcing, or continuing to exercise or enforce, a right or remedy over or against a property of the Company. Later attempts to enforce a costs award would in contrast be actions that might trigger those prohibitions, but that is a separate matter outside the jurisdiction of this Court, and I simply make the observation because the contrast assists my understanding of the decisions and Mr Allan's submission.

[36] Mr Allan made submissions concerning the ***Bielby*** decision, and other similar decisions. Concerning a possible analogy with enforcement proceedings (in the case of costs incurred by the Council, probably as distinct from costs incurred by a party under s274), Mr Allan cited ***Heli Harvest Limited v Marlborough District Council*** [18] where in enforcement proceedings, if costs are not fully met by an Applicant as an unsuccessful party, the costs incurred by the Council would fall on ratepayers. There is force in that, as can be seen from aspects of some direct referral decisions also cited by Mr Allan.

[37] Mr Allan referred, as had Ms Parkinson, to the fact that subsections (7) and (8) of s285 do not come into play on a transitional basis in relation to the present application, because the application preceded the date on which they came into force, 4 September 2013. He nevertheless referred to findings in ***Canterbury Cricket*** to the effect that subsections (7) and (8) were merely codification of the pre-existing approach taken by the Court in relation to costs awards to Councils in direct referral cases[19], where the Court said:

> ... the requirement that a consent authority render reasonable assistance to the Court simply codifies the law as found in earlier decisions of the Environment Court where it was held that consent authorities have a duty

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[17] Decision of the Employment Court in *Orakei Group (2007) Limited v Doherty* (No 2) [2008] ERNZ 505, and 512, cited with approval by the High Court in *Oceanic Seafoods Limited v Silla Co Limited* [2014] NZHC 78, at [6].

[18] High Court, 24 February 2005, CIV-2004-485-1669.

[19] At para [24].

> to assist the Court on a direct referral (see *Mainpower NZ Limited v Hurunui District Council* [2012 NZ RMA 421] and to do so is consistent with the proper discharge of the function of a Council (as in *Brookby Quarries v Auckland Council* [2012] NZEnvC 168.

[38] Mr Allan submitted that the leading case is a slightly earlier decision also called *Mainpower NZ Limited v Hurunui District Council,*[20] where the Court held that the council in direct referral cases plays a different role under the Act, being required to prepare reports in accordance s87F, and undertaking its functions under s 31 and 74 in relation to the District Plan. The Court held that councils have a duty to assist the Court by providing evidence on the subject matter, but which would not preclude the Council from supporting, opposing or taking a neutral stance on the application. The Court observed that the ability of councils to be able to recover their costs in direct referral proceedings was important to ensure ongoing full and active participation, from which the Court would not want to see Councils dissuaded.

[39] Mr Allan pointed out that in the ***Mainpower, Skydive*** and ***Canterbury Cricket*** decisions, the Environment Court held that councils were entitled to recover 100 percent of the costs incurred in relation to the direct referral proceedings.

[40] In reinforcement of those quite clear principles, Mr Allan reminded the Court that the present case had been found to be lengthy, tortuous, and complex, and that the Council had been appropriately represented by senior and junior counsel, and called evidence from 13 expert witnesses.

[41] As with the other claims, in the absence of input from WML in opposition, I have taken considerable care in its assessment. I am fully satisfied as to the matters recorded above, and make an order for payment of costs of $530,423.96 (including GST).

Claim for costs by the Crown

[42] The Registrar of the Court keeps careful records of time and cost in relation to direct referral proceedings, because of the provisions of s285. He has lodged a

[20] [2012] NZEnvC 56.

submission noting the Crown's entitlement to recover 100% of its costs in direct referrals. The Crown claims $427,404.33 (including GST), supported by a spreadsheet.

[43] As noted in the decision of the Court in ***Road Metals***, [21] the Registrar sometimes engages in discussions with applicants about finding an appropriate figure for payment of costs to the Crown in direct referral cases.

[44] As recorded in the Minute I issued on 5 February 2016, the Registrar endeavoured to enter such discussions with the liquidator of WML, but was unable to gain a response. Once again I do not have the benefit of submissions on behalf of WML or the liquidator, so do not know of any views opposing the appropriateness of the spreadsheet claim lodged with the Court by the Registrar (and sent to the liquidator).

[45] In these circumstances, and after careful consideration of the claim, I consider that the Court should award costs in the total of the sum claimed, $427,404.33 inclusive of GST. I award costs in that sum to the Crown.

Conclusion

[46] After careful consideration of all these matters, I award costs as follows:

(a) Direction Matiatia Inc $198,848.00.

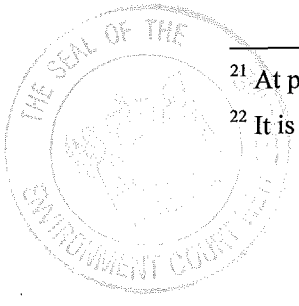
(b) K Lewis and T Greve $10,914.20.

(c) Auckland Council $530,423.96.

(d) The Crown $ 427,404.33.

(All sums are inclusive of GST).

[47] These awards may be enforced if necessary (and if legally permissible) in the District Court at Auckland.[22]



[21] At para [9].

[22] It is not within the jurisdiction of this Court to comment any further on enforceability by any means.

SIGNED at AUCKLAND this 9th day of February 2016

For the Court

L J Newhook
Principal Environment Judge