IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-7716

	BETWEEN	CHARMAINE JUSTINE WALDRON FRANCEINE LOUISE WALDRON Applicants
	AND	AUCKLAND CITY COUNCIL Respondent

Hearing: 14 December 2009

Counsel: Applicants in person
BE McDonald for Respondent

Judgment: 14 December 2009

ORAL JUDGMENT OF RODNEY HANSEN J

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Introduction

[1] The applicants are the registered proprietors of a residential property at Third Avenue, Kingsland. In anticipation of judicial review proceedings, they have sought interim relief to prevent the Council exercising its powers under s 459 of the Local Government Act 1974 to carry out drainage works on their property.

[2] When the matter was first called before Allan J in the Duty Judge List on 30 November, he granted an order restraining the Council from taking any steps pursuant to s 459, pending further order of the Court. The Council have now had an opportunity to consider the application and have filed a notice of opposition, supported by two affidavits, and a comprehensive memorandum of counsel. The Council asks for the interim order to be revoked.

[3] I have heard argument at the conclusion of the duty list. I have formed a clear view on the merits of maintaining the order. Having indicated my intention to deliver an oral judgment, I took a short adjournment. The applicants, who appeared in person and spoke in support of maintaining the order, had elected to leave the Court in the meantime.

Background

[4] The Council, together with Metrowater, has been engaged in a citywide project to prevent wastewater and polluted stormwater from flowing into the Waitemata Harbour. As part of that project, a partnership known as Clear Harbour Alliance between Metrowater, specialist consultants and a contractor has been undertaking works to effect the separation of sewer and stormwater drainage in the Kingsland and Eden Terrace area. That has involved separating the sewage and stormwater drainage in 905 properties in an area known as the Motions South Catchment.

[5] All of the properties in that catchment have now been separated with the sole exception of the property at Third Avenue owned by the applicants. Alone among property owners in the catchment, they have rejected a proposal by which the works would be carried out at the Council's cost to lay the necessary additional line or lines on their property.

[6] As a separate and unrelated issue, the applicants have also been engaged in a dispute with the Council over the laying of a public pipe across a corner of their property. That activity was carried out by the Council pursuant to its power under s 181 of the Local Government Act 2002. The Council acknowledged that it had wrongly laid that pipe before the objection period expired. It abandoned that particular pipe and started over again.

The applicants' case

[7] The applicants have purported to seek interim relief before filing a substantive application for review pursuant to r 7.53 of the High Court Rules which, in cases of urgency, permit the Court to grant an interlocutory injunction before a proceeding has been commenced. Whether or not that rule could aid the applicants in this situation was not argued before me. In deciding whether they are entitled to interim relief under s 8 of the Judicature Amendment Act 1972, I will leave to one side the omission to file an application for review and statement of claim.

[8] The threshold requirement for relief under s 8 is that an order is necessary for the purpose of preserving the position of the applicant. Once that threshold has been reached, the Court has a wide discretion whether to grant interim relief, having regard to, among other things, the strength of the applicant's case and the public and private repercussions of granting relief. Those relevantly include public health and safety issues: see, for example, *Whale Watch Kaikoura Limited v Transport Accident Investigation Commission* [1997] 3 NZLR 55; (1997) 10 PRNZ 481.

[9] In support of their submission that the interim order should be maintained, the applicants first referred to the illegal laying of the public pipe through their property. They also made reference to the failure of the Council to follow the

procedure in Schedule 12 to the Local Government Act 2002. I am, however, satisfied that the wrongful exercise of the power under s 181 is completely irrelevant to the issue I have to consider. As I have earlier mentioned, after issue was joined over the laying of the public pipe in the north west corner of the applicants' property, the Council abandoned that pipe and the applicants have not sought to further pursue remedies available to them under Schedule 12 to the Act.

[10] The second argument advanced by the applicants was what they described as a lack of consultation and duress in relation to the s 459 notice. No particulars of the allegation of lack of consultation and duress were provided, save for references to the fact that drawings have changed and the applicants are not aware of what they are consenting to.

[11] The power under s 459 is broad. Among other things, under subs (1) it permits the Council by notice in writing to require the owner of a property to provide, construct and lay a private drain and to connect that private drain with any public drain or watercourse or the sea as the Council sees fit.

[12] In an affidavit filed in support of the Council's notice of opposition, the project manager for Clear Harbour Alliance, Mr Bernard Howe, has detailed the steps taken to obtain consent from the applicants to carry out separation works. Along with other property owners, they were given the opportunity of having the additional drainage line laid in their property without cost. When they declined, a notice under s 459 was served in a final attempt to give effect to the separation of private drainage in the area. It required that they undertake the subject works by 16 November 2009. Were they to default, the Council gave notice that it would be entitled to enter the property to carry out the works with costs recoverable from the owners. The timeframe given to the applicants to complete the works was regarded as reasonable, given that the Clear Harbour Alliance had been endeavouring to obtain their consent to carry out the works since November 2008.

[13] The evidence satisfies me that the Council is acting within its powers under s 459 in issuing the notice. I am informed that it was accompanied by a detailed plan

which clearly depicted what works would be done and the area of the property affected. There is nothing in the evidence to substantiate this ground of opposition.

[14] Next the applicants complain of the likely damage to their property. It was submitted that the works would be "devastating to our garden". I was informed that the drainage line would be some 24 metres in length. The trench would be dug by hand. Only a single line would be involved for the purpose of laying an additional pipe. The area of the property disturbed by the works would be reinstated.

[15] Again, the evidence satisfies me that possible damage to the garden provides no basis to prevent the Council exercising its statutory powers. In any event, as I will later mention, any injury to the applicants' property arising out of the manner in which the works would be carried out may properly be the subject of a claim for damages.

[16] The final argument put forward by the applicants was that the works being carried by the Clear Harbour Alliance are not in the public interest. They see themselves as furthering the public good by taking steps which are effectively preventing the project being completed.

[17] However, the evidence of Mr Howe and also of Mr Michael McQuinlan, Group Manager, Environmental and Utility Management with the Council, satisfies me that it is very much in the public interest that the works be completed without delay. They explained how, for historical reasons including the rapid growth of population, the capacity of the drainage network is often exceeded. One of the consequences is that wastewater often overflows from the drainage network and into waterways. This project will help to avoid this serious public health hazard.

[18] The refusal of the applicants to cooperate in the project has meant that their wastewater is now flowing into a designated public stormwater line which services 88 other properties. Effectively, it is "polluting" the stormwater from those properties. As a result the public stormwater line has had to be diverted temporarily to a wastewater line which flows to the treatment plant at Mangere. This has had the

effect of negating the separating work undertaken on all properties upstream of the applicants' property in Third Avenue.

[19] These considerations lead me to the clear view that the applicants have not made out a case to maintain the interim orders. They have not shown that the Council has exceeded its statutory powers in the issue of the notice and the proposed exercise of its powers under s 459 of the Local Government Act 1974. But even if they had been able to show a possible breach of statutory duty, other factors would have weighed against the continuation of the interim orders.

[20] The applicants' private interest in preventing the works from being carried out is slight by comparison to the public interest in ensuring that the entire project is brought to a speedy conclusion. I accept that there are substantial costs to the public in unnecessary delay in completing the works. Should the applicants later be able to substantiate a breach by the Council of its statutory duties, there will be no difficulty in their obtaining an appropriate remedy by way of damages.

Result

[21] For these reasons, the interim orders are revoked. In the absence of the applicants, it is not practicable to make any timetable orders to further the proceeding. Before any meaningful progress can be made, they will need to file a substantive application for review. At this stage the proceeding is adjourned for mention to the Duty Judge List on Wednesday, 17 February 2010.