

**IN THE DISTRICT COURT  
AT MANUKAU**

**I TE KŌTI-Ā-ROHE  
KI MANUKAU**

**CIV-2022-075-000075  
[2022] NZDC 24799**

BETWEEN

THAMES COROMANDEL DISTRICT  
COUNCIL  
Plaintiff

AND

KEVIN JOHN BURLACE  
PAMELA CAROL WEGENER  
Defendants

Hearing: 15 December 2022

Appearances: B Robertson-Wright and J Libbey for the Plaintiff  
No appearance by or for the Defendants

Judgment: 15 December 2022

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**ORAL JUDGMENT OF JUDGE J FORREST**

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[1] The Thames Coromandel District Council has applied for authorisation to carry out building work under s 220 of the Building Act 2004 (the Act) to a property at 13 Waiohahi Rd, Thames (the property). The respondents, Mr Burlace and Ms Wegener, are the legal owners of the property. They have been the owners of that property for some years and are registered as joint owners of the property.

[2] There is a bit of a procedural history to this matter both in terms of the Council's dealings with the respondents, Mr Kevin John Burlace and Ms Pamela Carol Wegener, and in terms of the court history.

[3] I intend to address the background to the application, the factual and legal grounds for the application and the issue of substituted service. I reserve the right to amend this judgment before the transcribed copy is delivered.

[4] Ms Bray in her evidence states that she understands that the owners are in a relationship. They also own a property at 2/9 Phoenix Place in Papatoetoe, Auckland and her evidence confirms that all the Councils' communications in relation to the property (by email and text) have been with Mr Kevin Burlace on behalf of both owners.

### **Background to the application**

[5] In August 2020 the Council received a complain about retaining walls on the property. Following an inspection of the property the Council issued several notices to the respondents to fix issues identified by the Council during the period August 2020 to August 2021.

[6] On 1 October 2021 the Council's lawyers wrote to the respondents outlining the history of non-compliance and advising that unless the necessary work was completed by 12 November 2021 the Council would issue a final Notice to Fix. The Council inspected the property on 16 November 2021 and confirmed that the work had not been undertaken.

[7] On 14 December 2021, the Council issued the owners of the property with a final Notice to Fix which incorporated all the non-complaint building work. That included:

- (a) Two timber retaining walls.
- (b) A framed platform structure.
- (c) A blue metal clad building on a chassis.
- (d) Foundation structure with an adjoining deck and stairs connected to the blue metal clad building.
- (e) Caravan connected to the cabin in front of it by a non-compliant waste-water connection.

- (f) A black metal clad garden shed.
- (g) A timber deck attached to the enclosed carport.

[8] The notice to fix was issued on the grounds the work was undertaken without a building consent contrary to s 40 of the Act and/or that it did not comply with the Building Code contrary to s 17 of the Act. The notice to fix required the owners to remove all the building work identified or to apply for a certificate of acceptance for the building work carried out without a building consent. The deadline for compliance with the notice was 28 February 2022. On 8 and 15 March 2022, the Council visited the property and confirmed that no building work had been done to the buildings which were the subject of the notice to fix.

#### **Court application – order for substituted service**

[9] On 20 July 2022 the applicant Council filed an application for an order authorising the Council to carry out building work pursuant to s 220 of the Act.

[10] On 19 September 2022 the Council applied without notice for an Order for substituted service. That permitted service by email to the email address [twentycarats@gmail.com](mailto:twentycarats@gmail.com) and by firmly affixing the documents to the property at 2/9 Phoenix Place, Papatoetoe, Auckland (the respondent's home). The fact of service on the respondents on 20 September 2022 dated 4 October 2022.

[11] The Council attended the property on 25 October 2022 prior to the first call of this matter in court to confirm the unconsent building work was still in place. I was advised on 28 October 2022 by counsel for the Council that after service of the documents, the first respondent, Mr Burlace, had engaged in communications both with Ms Bray for the Council and with the Council's lawyers. On 28 October 2022, I set this matter down for a formal proof hearing today. I requested that the Council's lawyers provide further detail regarding those communications between Mr Burlace and the Council and themselves.

[12] I have now received a memorandum of counsel for the applicant for the formal proof hearing dated 8 December 2022, the supplementary affidavit of Ms Bray dated 29 November 2022, and a draft order pursuant to s 220 of the Building Act. The Council’s lawyers have also filed a memorandum of counsel seeking enlargement of the substituted service order. I will address that at the end of this decision.

[13] Ms Bray’s supplementary affidavit exhibits to it various text messages and emails between her and Mr Burlace. On 25 November 2022, Manukau District Court received what purports to be an affidavit from Mr Burlace. It is in the form of a handwritten letter but is not witnessed and reads:

We note the final call for this application is set down for 10 am Monday 17 Oct 2022 and is transferred to the Manukau District Court from the Thames District Court.<sup>1</sup> Notice has been given to Council to resolve this dispute.

To the District Court Manukau.

This document notifies you that: Between August 2020 and August 2021 I became critically aware that Ngaio Bray did not have the necessary background to be making necessary bldg. background in making the decisions of a compliance officer for Thames District Council and was giving wrong and improper decisions on important rulings for the Thames Council.

As a technical teacher qualified for Fine and Applied Arts teacher for 6 years wrong decisions by Ngaio Bray and also pointed out to Ngaio Bray made it impossible to rely on these decisions and could not be depended on. Other work I was currently involved also gave me reason to dismiss Ngaio Bray’s competence. Incorrect answers were given regarding some of leakages, areas that were affected and ways to remedy which were way out of line. Ngaio was considered a waste of Council resources and money. Questions of Ngaio’s qualifications were not answered by Ngaio and more than one letter to the Mayor was not addressed or answered. This continued to happen. Several of these letters have incorrectly not been included in Ngaio Bray’s summary of events, giving rise to two or more letters of “incompetence” and requests to raise issues of no competence in Ngaio. This has largely been ignored and or swept aside.

P.S. Further health issues plagued me from the above date, having had to have 2 spinal operations, 1 Covid treatment, continued back treatments meaning that alternative contractors needed to be engaged. Infection occurred as a result of 1<sup>st</sup> operation. Also 2<sup>nd</sup> back operation had variety of problems meaning other options needed. I out of the action.

[Signature]

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<sup>1</sup> The document refers to “we” which I understand to be on behalf of both respondents.

It should be recorded that the Cabin and Caravan has not been finished and requests to finalize have been stopped at every stage by Thames Counsel (Ngaio Bray). As this has never been able to be completed or even used, this case has never become valid (never allowed to be finished). New rulings state that vehicles on wheels can be now parked up on one's property and not considered a building. Often to also assist Thames Council to offer for temporary accommodation when finished (to Council) has been ignored or rebuffed (for those in need).

[Signature]

Height, distances and boundaries are on variance to Council's rules on the same street, therefore clashing with Council rules.

[Signature]

[14] I have recorded Mr Burlace's communication with the Court in detail because this has not been served on the applicant and it raises several issues. Importantly, it is clear is that Mr Burlace is aware of the application.

[15] Because of the issues raised by Mr Burlace I wish to outline Ms Bray's background. She is the Building Compliance Manager at the Council and as of July 2022, she had held that role for approximately 18 months. Prior to that role she was a Building Compliance Officer for four years. Her affidavit outlines that she has been in government regulation and enforcement for 22 years. She has held positions in regulation and compliance with Auckland City Council, New Zealand Police and New Zealand Customs Service. She also states that she is a former police officer.

[16] I have read three affidavits (including exhibits) from Ms Bray. I am not satisfied that there is any merit in the criticisms raised by Mr Burlace. If he had any legal challenge to the notices issued, he ought to have filed a notice of opposition to the application outlining the grounds/reasons. He has not done that.

[17] This is not a personal matter between Mr Burlace and Ms Bray. Notices have been issued under the Building Act and have been ignored for a lengthy time as detailed in Ms Bray's affidavit. The Council has then made application to the Court. This proceeding has also been ignored by Mr Burlace and/or the respondents except for the document referred to above.

## **Grounds for the Order sought**

[18] The order sought is under s 220 of the Building Act. That provision provides that a building consent authority, a territorial authority or regional authority may require a person to carry out building work on or in connection with any building. If that person after being given notice of the requirement, fails to commence to comply with the notice within the time stated in the notice or, if the time is not so stated, within a reasonable time and that person fails to immediately proceed with the work with all reasonable speed then the territorial authority may apply to the District Court for an order authorising the authority to carry out building work.

[19] Before applying to the court, the territorial authority must give the owner of the building not less than 10 days' notice of its intention to do so.

[20] The application for authorisation to carry out the building work is made on the following grounds:

- (a) From August 2020 to August 2021, the Council issued seven notices to fix which were not complied with by the respondents. Those notices to fix are exhibited to the first affidavit of Ms Ngaio Anne Bray dated 7 July 2022.
- (b) On 14 December 2021, the Council issued a final notice to fix to the respondents in respect of the building work. Again, the final notice to fix is exhibited to the affidavit of Ms Bray.
- (c) The respondents have failed or refused to commence to comply with the notice to fix within the timeframe stated in the notice to fix, being 28 February 2022. That position is confirmed in the affidavit of Ms Ngaio Bray filed in support of the application and her supplementary affidavit dated 29 November 2022. The later affidavit includes colour photographs at exhibit NAB8 of her affidavit evidencing that the work had not been commenced or completed.

- (d) On 23 May 2022, the Council put the respondents on notice that if after 10 days the issues outlined in the notice to fix were not remediated the Council would make the application to the District Court for an order under s 220 of the Act.
- (e) The Council did then apply to the Court for an order.

[21] I am therefore satisfied that the respondents have been served. The applicant Council has satisfied me of the grounds for the making of an order under s 220 of the Building Act .

### **Order**

Pursuant to s 220 of the Building Act 2004 I make an Order:

That the Council is authorised to carry out building work (including demolition if deemed appropriate), pursuant to s 220 of the Act, required to make complaint the building works at the property as identified in the final notice to fix dated 14 December 2021 (NTF\2021\154).

### **Other Orders**

[22] I am also asked to address the issue of costs today. As detailed in the application that was served on the respondents the applicant is entitled to its actual and reasonable costs incurred in completing any building work including demolition to ensure that the property is compliant.<sup>2</sup>

[23] The respondents as owners of the property are liable for the costs of the Council's authorised building work. Once the costs of the Council's authorised building work have been quantified and upon the filing of an affidavit evidencing these costs the court will make an order of costs in favour of the applicant. The amount of the Order will be based on the actual and reasonable costs incurred by the Council.

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<sup>2</sup> Section 220(4) of the Building Act 2004.

[24] The Council is also entitled to an Order in relation to its legal costs in relation to this proceeding calculated on a Schedule 2B basis.

[25] I am prepared to consider the issue of legal costs together with remedial or demolition costs upon the filing of a schedule outlining those costs.

[26] The final matter I wish to deal with today is the memorandum which seeks enlargement to the substituted service order. As I have outlined the applicant was granted the substituted service order with respect to the original documents filed on 19 September 2022. I am advised that the applicant originally sought for an order for substituted service to encompass any further documents required to be served on the respondent during proceedings. However, the registrar required that the applicant removed that paragraph before the Orders were made.

[27] I am satisfied that it is appropriate that the enlarged order is made, and I therefore make an order that this decision, any sealed orders made and any other documents relating to the application before the court may be provided to the respondents by way of substituted service as outlined in the original order. That is by email and by fixing a copy of the documents to the door of the respondents' residential property. The extension of the order for substituted service also applies in respect to any documents filed and orders made relating to costs.

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Judge JL Forrest

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 19/12/2022