BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 161

IN THE MATTER	of the Resource Management Act 1991
AND	of an application under s 314 of the Act
BETWEEN	VIVIENNE THERESSE TAUEKI
	(ENV-2018-WLG-000037)
	Applicant
AND	HOROWHENUA DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing:	20 June 2018 at Levin
Appearances:	L Thornton for the Applicant D Randal and L Cowper for the Respondent S Johnston for the Manawatu-Wanganui Regional Council
Date of Decision:	31 August 2018
Date of Issue:	31 August 2018

COSTS DECISION OF THE ENVIRONMENT COURT

A: Costs awarded

REASONS

Introduction

[1] On 20 June 2018 I gave an oral decision[1] declining an application made by Vivienne Theresse Taueki (Ms Taueki) for an enforcement order prohibiting Horowhenua District Council (the District Council) from undertaking works in the Queen Street drain situated in the vicinity of Kowhai Park, Queen Street West in

[1] [2018] NZEnvC 109.

Levin.

[2] In declining Ms Taueki's application, I reserved costs in favour of the District Council whilst observing that there appeared to be little point in pursuing a costs application in this case, due to advice which Ms Taueki's Counsel (Ms L Thornton) had given to the Court about her financial capacity. I noted that ultimately it was the District Council's decision as to whether or not to pursue a costs application and it has determined to do so notwithstanding the Court's observation.

Background

[3] The Queen Street drain is a public drain conveying stormwater from Levin to Lake Horowhenua. It is situated on road reserve vested in the District Council. The road reserve adjoins an area known as Kowhai Park which is a recreation reserve also vested in the District Council.

[4] Some years ago, as a result of work undertaken by the Council, an archaeological site (Site 25/88) was identified in Kowhai Park. Subsequently, a midden site known as Midden 4 was discovered within the drain area adjacent to Site 25/88.

[5] The District Council wishes to undertake work in the drain close to Midden 4. The work to be undertaken involves laying large pipes to stabilise the drain which is eroding, potentially leading to collapse of a portion of the road and nearby trees.

[6] Ms Taueki contended that undertaking the works in the drain would modify or destroy Midden 4, which is an archaeological site as defined in the Heritage New Zealand Pouhere Tāonga Act 2014 (the Heritage Act). Section 42 Heritage Act precludes the undertaking of works which might modify or destroy an archaeological site, unless consent has been obtained from Heritage New Zealand (HNZ).

[7] Ms Taueki applied for an enforcement order pursuant to s 314(1)(a)(i) RMA, which relevantly provides:

> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:
>
> (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Environment Court,—

(i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); ...

[8] It will be seen that s 314(1)(a)(i) enables the Court to make an enforcement order if an action undertaken or to be undertaken by any person contravenes any of the instruments identified in paragraph (i). I found that the Council's actions did not contravene any of those instruments and were in fact permitted activities under the relevant planning documents. Section 314(1)(a)(i) did not apply to breaches (or contended breaches) of instruments created under the Heritage Act (except in limited circumstances where HNZ could apply for an enforcement order).

[9] Further to that, I went on to consider whether or not it might be appropriate to make an enforcement order pursuant to s 314(1)(a)(ii) on the basis that the action of modifying or destroying Midden 4 was something which is likely to be noxious, dangerous, offensive or objectionable to such an extent as to have an adverse effect on the environment, even though Ms Taueki had not sought an order under that provision. I found that no order should be made under this provision either.

[10] Finally, and relevantly for the purposes of this decision, I determined that there was no evidence that the District Council intended to modify or destroy (damage) Midden 4 in any event. The Council was well aware of the presence of Midden 4. It had obtained an archaeologist's report which established that work could be undertaken in a manner where the midden was not modified or destroyed. The Council intended having an archaeologist present when works were being undertaken and if it became apparent that such works were likely to modify or destroy the midden, then work would cease and an application to HNZ to approve such modification or destruction would be made.

[11] The ultimate outcome of my considerations was that I determined that not only was there no jurisdictional basis on which an enforcement order might be made but neither was there any case to do so on the merits.

The Council Costs Application

[12] The Council sought a costs award of $12,580 being approximately one third

of actual legal costs incurred by it. It provided invoices establishing that it incurred total legal costs of $37,734.66, excluding GST.

[13] The Council made the following submission in respect of costs:

> 9. In this case, a fair and reasonable award would be one-third of its actual costs, for the following reasons:
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> (a) Ms Taueki's application was unmeritorious, in that it disclosed no reasonable basis on which the order sought could be made, and was ultimately unsuccessful.
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> (b) Counsel for the Council sent an email, on a 'without prejudice save as to costs' basis, annexed to this memorandum as **Attachment B.** In it counsel:
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> (i) invited Ms Taueki to withdraw her application, in return for costs incurred to that point lying where they fell; and
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> (ii) noted matters that were later findings central to the Court's decision, including:
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> (1) that the Council's proposed works were small-scale and would be supervised by an archaeologist, that Ms Taueki would be given advance notice of the works taking place, and that works would stop if any archaeological site was encountered; and
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> (2) the legal position that no archaeological site can be modified or destroyed without an archaeological authority.
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> (c) That offer was rejected, which necessitated a hearing and the incurring of further costs by the Council.
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> (d) The Council has also incurred additional costs arising from the application, not sought to be paid by Ms Taueki, including those referred to at paragraph 6 above.

Ms Taueki's Response to the Costs Application

[14] Ms Taueki opposed a costs award. She reminded the Court that she is unable to meet any costs award. She contended that it would be "punitive" to seek such an award when it was unclear if it would be enforced. She referred to the fact that she is reliant on a sickness benefit for her income and that although she did not have a grant of legal aid for this proceeding, she obtained a waiver of application fee from the Registrar.

[15] Ms Taueki's submission advised that the legal work done on her behalf in this instance was done *pro bono* and counsel considered that there was a public interest element which merited consideration.

[16] Lastly, it was contended on Ms Taueki's behalf that she "did not conduct this litigation in a manner that exacerbated costs and did not raise extraneous matters. She brought to the Court the Archaeology report, which the Court found helpful in making its decision, even though the Council declined to produce that document".

Discussion

[17] The Court's power to award costs is found in s 285 RMA:

> **285 Awarding costs**
>
> (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable.

[18] Section 285 gives the Court a wide power to award such costs as it "considers reasonable". Notwithstanding the wide discretionary power it is well recognised that costs must be awarded on a principled basis. Costs must not be awarded to punish litigants and those who bring actions before the Court. The purpose of costs awards is to compensate parties to proceedings where that is just.

[19] Although each case must be viewed on its merits, it is well-recognised that costs are likely to be awarded against unsuccessful parties in enforcement proceedings. That is because such proceedings are of considerable consequence (the breach of an enforcement order, potentially leading to criminal liability) so that parties subject to enforcement order applications have no option but to respond to them. The somewhat unusual aspect of this case was that it was a case of a resident bringing enforcement proceedings against a local authority, rather than the other way around. Notwithstanding, I consider that the usual principles should apply.

[20] In this case Ms Taueki's application was unsuccessful, not only because there was no jurisdiction to make an enforcement order on the basis she advanced, but further that there was no basis to do so *on the merits*. When parties bring proceedings which fail under those circumstances, there must be a heightened possibility that they might be subject to a costs award.

[21] The other matter which became apparent on considering the Council submissions was the Council invited Ms Taueki to withdraw her application on the basis that costs would lie where they fell. Further to that, the Council gave assurances that the works would be supervised by an archaeologist, that Ms Taueki would be given notice of the works taking place and that the works would stop if an archaeological site was encountered. The Council stated that it was aware of the need to obtain an archaeological authority in the event that an archaeological site was likely to be modified and destroyed.

[22] Under those circumstances, it can only be concluded that Ms Taueki determined to *run the risk* that her proceedings would be successful.

[23] The other matter which I have considered is Ms Taueki's financial situation. I accept the advice given by Ms Thornton, that Ms Taueki does not have the financial resources to meet a costs claim of any substance. She is a beneficiary and payment of the filing fee in these proceedings was waived by the Registrar. As the Court has observed previously, the appropriate time to have regard to those considerations is at the commencement of proceedings, not at their conclusion. That position is exacerbated in this case where the Council made a formal offer to Ms Taueki that if she withdrew the proceedings, costs would lie where they fell at that time.

[24] The submission filed on Ms Taueki's behalf suggests that the costs award might be seen as punitive if the Council did not intend to enforce it. It is difficult to see how that might be the case, although I appreciate that Ms Taueki might well be uncomfortable to be in the situation of having a costs award hanging over her head even if enforcement is not sought. Ultimately, that is a decision for the Council not the Court.

[25] If the Council did not seek a costs award in a situation such as this, then it means that costs will be borne by the ratepayers of the district. Arguably, it has an obligation to seek to recover costs in that situation.

[26] It must also be observed that in this situation where the application failed on the grounds of both jurisdiction and merits, the Council has been generous in its costs application by seeking recovery of only one third of the costs which it incurred. Arguably it would be entitled to a much higher award (possibly even indemnity

costs) had it sought to pursue costs to that level.

Outcome

[27] Vivienne Theresse Taueki is ordered to pay to Horowhenua District Council the sum of $12,500 in reimbursement of costs incurred by the Council. This costs award to be enforced if need be in the District Court at Levin.

B P Dwyer
Environment Judge