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

Decision No. [2019] NZEnvC 35

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement orders pursuant to s 316 of the Act
BETWEEN	WILLIAM PETER TAYLOR, SUSAN MARY TAYLOR, SCOTT KERRY JACKSON, SARAH ANNE JACKSON, RICHARD DONALD JOHNSTON, RACHEL ELIZABETH JOHNSTON (ENV-2018-AKL-068) Applicants
AND	GEOFFREY CLEMMENT SMALL, ARIA SMALL Respondents

Court:	Environment Judge M J L Dickey, sitting alone pursuant to s 279 of the Act
Submissions:	R Brabant for the Applicants B Tree and S de Groot for the Respondents
Date of Decision:	4 March 2019
Date of Issue:	4 March 2019

COSTS DECISION OF THE ENVIRONMENT COURT

A: The applicants are ordered to pay $20,000 towards the respondents' costs and expenses.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

Introduction

The application for enforcement orders

[1] On 1 May 2018, William and Susan Taylor, Scott and Sarah Jackson, and Richard and Rachel Johnston (**the applicants**) lodged an application for enforcement orders against Geoffrey and Aria Small (**the respondents**).

[2] The applicants discontinued the proceedings on 13 December 2018 and the respondents brought this application for costs.

[3] The application for enforcement orders (summarised) sought to:

(a) Prevent the respondents as owners of the property at 202K Ingram Road, Ramarama (**Site**) from contravening the Resource Management Act 1991(**RMA**), and the rules in the Auckland Unitary Plan: Operative in Part (**Unitary Plan**) (s 314(1)(a)(i));

(b) Require the respondents to comply with the RMA and the Unitary Plan Rural – Countryside Living Zone rules which require resource consent for an equestrian centre and workers' accommodation (s 314(1)(b)(i));

(c) Require the respondents to avoid, remedy or mitigate actual and likely adverse effects on the environment caused by the establishment and operation of an equestrian centre on the Site (s 314(1)(c));

(d) Require the respondents to remove the stables, horse training arena, horse walker, truck / machinery shed and hard stand and parking areas together comprising the equestrian centre (including accommodation for workers and guests) in the absence of a resource consent authorising the construction and use of the equestrian centre and workers' accommodation (s 314(1)(a)(i)).

Background

[4] The relevant background is set out in the following table:

17 May 2018	Judicial telephone conference. Potential dates for hearing were identified as being in July or August 2018. Advice from Mr Brabant about lodgment of High Court proceedings. The parties were directed to file a joint memorandum by 25 May 2018 outlining whether a hearing would be required and when. In addition to the application for enforcement orders filed in this Court, the applicants also filed an application for declarations in the High Court. The declaration proceeding concerned the interpretation of restrictive covenants. The declarations sought were that (summarised):[1] (a) Only three dwelling houses may be built on the land that the respondents, purchased in 2013; and (b) The equestrian facilities building (**the building**) which the respondents have already constructed on that land, is in breach of the terms of the restrictive covenants. Further, injunctions were also sought seeking to restrain the respondents from constructing any more than three dwelling houses on their land and ordering the respondents to remove the building.[2]
25 May 2018	A joint memorandum was filed and hearing dates of 25 and 26 July 2018 agreed. A timetable for evidence was imposed based on the parties' suggestions.[3]
16 July 2019	The evidence timetable was later extended, and the potential hearing date was adjourned at the request of both parties.[4]
26 July 2018	Judicial telephone conference: the Court was advised that the filing of evidence had been completed and a report date of 3 August 2018 suggested to outline the outcome of a settlement meeting and advise whether a hearing would be required. The

[1] *Taylor v Small* [2018] NZHC 2785, para [1].
[2] *Taylor v Small* [2018] NZHC 2785, para [2].
[3] Minute dated 29 May 2018.
[4] Minute of the Court dated 16 July 2018.

	Court reserved dates in October 2018 as potential dates for a hearing.[5]
16 August 2018	In a joint memorandum, the parties advised the Court that settlement discussions concerning the enforcement proceeding had been unsuccessful. In the absence of an agreement to settle, and the upcoming hearing of the declaratory proceeding in the High Court, the applicants advised the Court that it was their view that the outcome of the High Court proceeding was likely to determine whether a fixture would be sought for the Environment Court enforcement proceedings or whether the applications would be withdrawn.
	A further reporting date was sought after the High Court proceeding was heard. The memorandum of the parties records that the respondents did not oppose that request. In response, the Court adjourned the hearing of the enforcement orders until after the High Court proceeding had been determined leaving a week in late October to be confirmed by 5 October 2019.
29 October 2018	The High Court issued its Judgment[6] and made the declaration sought in the second cause of action, namely that the equestrian facilities complex (described in the judgment of the judiciary) is in breach of the restrictive covenant. The Judgment has since become the subject of an appeal and a cross appeal by both parties in the Court of Appeal.
10 December 2018	The applicants filed a memorandum stating that they had come to the view that there was no useful purpose served in pursuing the enforcement application relating to the use of the equestrian facilities building, the High Court having found that the building breaches the restrictive covenant on the title to the respondents' property. The applicants advised the Court that their intention was to discontinue the enforcement proceedings.

[5] Minute of Court dated 26 July 2018.
[6] *Taylor v Small* [2018] NZHC 2785.

13 December 2019	A formal notice of discontinuance was filed withdrawing the applications for enforcement orders.

[5] A timetable for filing applications for costs was set. The respondents have sought costs against the applicants. In determining the issue of costs in this matter the Court has read and considered the memorandum of counsel for the respondents as to costs dated 21 December 2018 (**first memorandum**), the memorandum of counsel for the applicants in reply dated 29 January 2019 and the memorandum for the respondents' in response dated 7 February 2019 (**respondent's response memorandum**).

Amount of claim

[6] The respondents have incurred total solicitor/client and witness costs and disbursements in respect of the proceedings of $65,385.38. Of that, $63,156.59 (including GST) are solicitor/client costs and disbursements and $2,228.76 (including GST) are witness costs and disbursements.

[7] The respondents submit that an award of at least 70 percent of the costs incurred by them in relation to the proceedings is appropriate in the circumstances. That equates to an award of at least $45,769.77.[7] In essence, the basis of their claim is that they had to formally respond to an application for enforcement orders which was withdrawn before a hearing was held.

[8] The applicants oppose an award of costs and submit that in the circumstances of the case costs incurred to date by both parties should lie where they fall.[8] If that submission is not accepted, the applicants claim that reasonable costs would be appropriate, being the mid-point between the costs calculated according to the District and High Court Rules, or $10,000.[9]

Legal principles

[9] Under s 285 of the Act the Court has a broad discretion as to whether to make an

[7] Respondents' first memorandum, paragraph [11].
[8] Applicants' memorandum, paragraph [27].
[9] Applicants' memorandum, paragraph [50].

award of costs.[10] There is no scale of costs and costs are not awarded as a penalty but in the exercise of judicial discretion where compensation is just.[11] As well, the Court's usual approach to costs is the subject of its general Practice Note.[12]

[10] Section 285 of the Act states as follows:

> (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

[11] In the Environment Court costs awards tend to fall into three broad categories: [13]

(a) Standard costs, which generally fall within a "comfort zone" of 25-33 per cent of actual costs incurred;

(b) Higher than normal costs, where particular aggravating or adverse factors might be present, such as those identified in *Bielby*;[14] and

(c) Indemnity costs, awarded only rarely and in exceptional circumstances.

[12] The five relevant circumstances to be taken into account in making substantial awards of costs under *Bielby* are:

(a) Where arguments are advanced that 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 a manner as to unnecessarily lengthen the hearing;

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

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

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[10] *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).
[11] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385; (1996) 2 ELRNZ 138 (PT).
[12] Environment Court Practice Note 2014, section 6.6.
[13] *Van Dyke Family Trust v Tasman District Council* [2011] NZEnvC 405.
[14] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

Costs in enforcement proceedings

[13] In enforcement proceedings, the Court will take into consideration that fact that respondents have no choice to engage in the proceedings and defend their position.[15] The Court is also more likely to award costs against an applicant for enforcement orders where the case has little or no merit, particularly if the applicant has refused a generous pre-settlement proposal.[16]

The application for costs – the matters raised

[14] The respondents' costs are particularised in the Table attached as Appendix E to their first memorandum with invoices included in Appendix F. Further detail of the legal costs is contained in Appendix A of the respondents' response memorandum.

[15] In support of their claim for costs the respondents rely on the following:

(a) The Court's Practice Note, clause 6.6(a) and case law addressing withdrawal of application for enforcement orders;

(b) That they are without fault;

(c) A successful application would have had serious consequences for them necessitating a serious and comprehensive approach;

(d) The proceedings caused financial strain and stress;

(e) There is no justification for the discontinuance of the proceedings;

(f) The applicants approach to settlement was unhelpful;

(g) The proceedings raise no element of public interest;

(h) A Calderbank letter was sent to the applicants.

[16] In addition to responding to the above, the applicants submit that the quantum of

[15] *Topping v Gibbons Holdings*, Environment Court Christchurch, C121/92.
[16] *Jackson v Phillips*, Environment Court Wellington, W063/08.

costs sought is not reasonable.

Analysis

[17] I now set out a summary of the arguments and my findings in respect of each.

The Environment Court's Practice Note and approach

[18] The respondents submit[17] that the Environment Court's historical approach indicates that it is appropriate to award costs against the applicants. In reliance on the Practice Note, clause 6.6(a), they submit that the Court will normally award costs against the appellant when an appeal has been withdrawn after being set down for hearing. They submit that the same approach applies when applications for enforcement orders are withdrawn and cite three cases in support: *Smith and Dunning*,[18] *Port Nelson Limited v Gleneagles Limited*[19] and *Mears v Mangaroa Metal Company*.[20]

[19] In response, the applicants submit that the clause in the Practice Note is directed at late withdrawals or late advice of withdrawal of an appeal that will normally result in costs in favour of a party who has been put to unnecessary expense in preparing for a hearing. The applicants claim that the respondents were not put to any expense or unnecessary expense in preparing for a hearing. They state that the allocated fixture was vacated at the request of both parties, and no hearing preparation costs can be identified from the invoices.[21]

[20] Although the Court's Practice Note does not specifically refer to enforcement proceedings, I consider the approach taken to appeals that are withdrawn before hearings to be helpful.

[21] In support of their claim, the respondents referred to cases where applications for enforcement orders have been withdrawn before hearing and costs awarded. However, I consider that each case must turn on its facts.

[17] Respondents' first memorandum, paragraph [20(a)].
[18] EnvC Auckland, A212/03.
[19] EnvC Wellington, W65/2004.
[20] EnvC Wellington, W3/2006.
[21] Applicants' memorandum, paragraph [41(a)].

Without fault

[22] The respondents submit they are *without fault* and that they had to invest considerable time and resources in opposing the application.[22] In response, the applicants submit that in previous costs decisions, the Court has made it plain that it will not make any decision about the merits of an application, the grounds of opposition, or enter into consideration of affidavit evidence which has not been tested before the Court.[23]

[23] As there was no hearing, I cannot assess the merits of the application.

Serious consequences

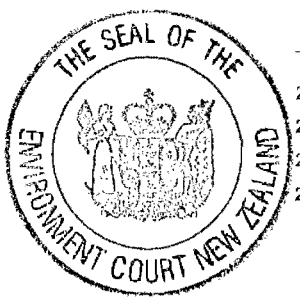
[24] The respondents submit that the serious consequences of a successful application necessitated that they take a serious and comprehensive approach to its opposition. They claim that any orders granted would have caused them considerable hardship and financial loss.[24] The applicants recognise that an enforcement application imposes an obligation to respond to the proceedings and accept that the respondents were acting responsibly in engaging legal counsel and a planning consultant.[25]

[25] I find that an application for an enforcement order is a proceeding of some significance as of its nature it seeks to compel a party to undertake or cease to undertake certain actions. A respondent is obliged therefore to respond to the proceeding in order to protect their interests.

[26] In this case the respondents filed a notice of opposition and three affidavits. They also participated in judicial telephone conferences and filed several joint memoranda with the Court.

Financial strain

[27] The respondents submit that the proceedings caused financial strain and stress. The applicants submit that this is not a ground for a costs award, let alone a higher than



[22] Respondents' first memorandum, paragraph [20(b)].
[23] Applicants' memorandum, paragraph [41(b)].
[24] Respondents' first memorandum, paragraph [20(c)].
[25] Applicants' memorandum, paragraph [41(c)].

normal costs award.[26]

[28] I agree that this is not a relevant matter.

Justification for the discontinuance

[29] The respondents assert that there is no justification for the discontinuance that would make the award of costs against the applicants inappropriate. The respondents submit that the application was discontinued after evidence was filed, because it lacked merit. They further contend that the reasons cited by the applicants for discontinuing the application have no bearing on it. In particular, the High Court judgment and matter now before the Court of Appeal are declaratory proceedings relating to the interpretation of restrictive covenants affecting the respondents' land, and that the legal issues being considered in those proceedings are distinctly different from those raised by the application for enforcement orders. They further claim that the nature, scale and intensity of their equestrian activities on their land have not materially changed since the activities were lawfully established, or since the application for enforcement orders was filed.[27]

[30] In response, the applicants submit that the declaratory proceedings, as they relate to the equestrian facilities, were relevant to the enforcement proceedings, and that that was the applicants' position from the outset, as recorded in the first Minute of the Court. Counsel for the applicants submits that when the High Court judgement was issued, a notice of withdrawal of the enforcement proceedings was promptly filed. Further, that the decision to pursue only one set of proceedings (in the Court of Appeal) means the parties can achieve finality without the Court making a determination on the enforcement application. The applicants further claim that a reference to evidence presented in opposition to the application for enforcement orders is an attempt to invite the Court to determine the merits of the respective parties' arguments and evidence in deciding costs. The applicants claim that there is no authority for the Court to determine merits in deciding the matter of costs.[28]

[31] I have considered the relevance of the High Court proceedings filed by the

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[26] Respondents' first memorandum, paragraph [20(d) to (e)], Applicants' memorandum, paragraph 41(d)].

[27] Respondents' first memorandum, paragraph [20(f)] and response memorandum, paragraphs [9] to [12].

[28] Applicants' memorandum, paragraphs [9] to [11], [21] to [26], [41(e)].

applicants at the same time as the application for enforcement orders was filed. As already discussed, those proceedings related to compliance with restrictive covenants. They did not involve matters of resource management, although the applicants' counsel advised this Court that their resolution may determine whether a hearing was required on the enforcement proceeding.[29]

[32] Counsel for the applicant states in his memorandum on costs[30] that these proceedings were withdrawn forthwith on receiving the High Court's decision. I note the decision was issued on 29 October 2018, but that the proceedings were not withdrawn until 13 December 2018. In any event, it seems from my review of the respondents' invoices that the bulk of costs were incurred in the three months following the filing of the proceedings.

Approach to settlement

[33] The respondents assert that the applicants' approach to settlement was unhelpful. They claim that the applicants were unwilling to compromise or identify any realistic or fair grounds on which the parties might settle the proceedings, and settlement efforts were ultimately unsuccessful.[31] The applicants claim that it is unusual and inappropriate for a submission to be made about the conduct of the parties in settlement discussions, given that the meetings took place on a confidential and without prejudice basis. Some detail is then provided of the outcome of a meeting that took place after the fixture for 25/26 July 2018 had been vacated, to which the respondents respond in their response memorandum.[32]

[34] It is clear that some attempts were made to settle the matters at issue, to no avail. I have not considered the applicants' claim about conduct in the settlement discussions, as those discussions occurred on a without prejudice and confidential basis.

No public interest

[35] The respondents submit that the proceedings did not raise any issue of general public interest. In response, the applicants claim that public interest was never raised as

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[29] Joint Memorandum, 16 August 2018.
[30] Applicants' Memorandum, paragraph [40].
[31] Respondents' first memorandum, paragraph [20(g)].
[32] Applicants' memorandum, paragraph [41(f)].

a relevant factor.[33] I do not consider this matter further.

Calderbank letter

[36] The respondents' view is that the application lacked merit and reference is made to a Calderbank letter sent to the applicants.[34] The applicants' response is that the merits of the application are not relevant to a costs determination, and that the existence of a Calderbank letter does not and cannot have any influence on the exercise of the Court's discretion under s 285 RMA.[35]

[37] In *Envirowaste Services Limited v Auckland Council*[36] this Court explored whether a *Calderbank* letter could be relevant to costs in an Environment Court proceeding. In that case the Judge did not find it relevant but determined that there may be cases where it could be a relevant factor in determining costs.

[38] The Environment Court has a discretion as to whether make an award for costs, and a discretion in determining the amount of any such award. The Environment Court also has the jurisdiction and discretion to award security for costs. A *Calderbank* letter cannot override this jurisdiction and discretion. However, I agree that the existence of such a letter may be relevant in considering whether a party has explored the possibility of settlement. As discussed above I am satisfied that both parties engaged in settlement discussions. The fact that these discussions were unsuccessful does not mean that the parties failed to explore the possibility of settlement. Accordingly, I find that the existence of the *Calderbank* letter does not of itself justify an award of costs.

Quantum

[39] The applicants raise an issue as to whether the quantum of costs sought is reasonable, referring to the Court's decision in *Sybeem Holdings Ltd v Auckland Council*.[37] They submit that the invoice costs and disbursements charged are disproportionate for the work undertaken, and state that the respondents' involvement comprised the filing of a "relatively brief notice of interest and opposition, three affidavits

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[33] Respondents' first memorandum, paragraph [20(h)], Applicants' memorandum, paragraph [41(g)].
[34] Respondents' first memorandum, paragraph [20(i)].
[35] Applicants' memorandum, paragraph [41(h)].
[36] [2011] NZEnvC 209.
[37] *Sybeem Holdings Limited v Auckland Council* [2012] NZEnvC 9.

(one of which was from an experienced planning consultant whom the Court can expect would have drafted the affidavit with legal input being the review of the draft and finalisation) and completion of a number of straightforward and mostly joint memoranda for the Court in relation to the telephone conferences and procedural directions given between May and September 2018, and attending procedural conferences, but by telephone".[38]

[40] The applicants submit that guidance as to the issue of costs can be derived by reference to the costs that would be awarded to a successful party in the District Court, or in the High Court in respect of the work undertaken in these proceedings on behalf of the respondents. Reference is made to *Thurlow Consulting Engineers & Surveyors v Auckland Council*[39] where reference is made to three bands of costs "that in practice have emerged as being commonly used when arriving at a costs award as being 'not dissimilar' to the standard, increased and indemnity scales utilised in the High Court".[40]

[41] The applicants claim that if an award of costs were to be made, an award of standard costs should not be made on the basis of the comfort zone of 25-30 percent of actual costs incurred, since that would not amount to reasonable costs. It is claimed that if a costs award were to be made, the mid-point between the costs calculated according to the District and High Court Rules would be appropriate, or $10,000.[41]

[42] On the issue of reasonableness, the respondents address the applicants' submissions in their response memorandum. They submit that the "scope of the legal work undertaken for the Respondents in relation to the Application for Enforcement Orders is far broader than the four items listed by the Applicant and the items that apply to a scaled costs application in the District Court or High Court." They further submit that the application for enforcement orders triggered research on the relevant plan provisions and case law to sufficiently consider their legal position, issue the Calderbank letter and prepare robust evidence opposing the orders sought.[42]

[43] In response to the applicants' reference to the *Thurlow* case, the respondents submit that the authorities do not suggest that it is appropriate to substitute the High Court

[38] Applicant's memo, paragraphs [42] to [45].
[39] [2013] NZHC 2468.
[40] Applicants' memorandum, paragraphs [46] to [48].
[41] Applicants' memorandum, paragraph [50].
[42] Respondents' response memorandum, paragraphs [13] to [19].

or District Court's approach for the Environment Court's wide discretion.[43]

[44] I address quantum in the next section.

Outcome

[45] Having carefully considered the matters raised by the parties I have concluded that an award of costs should be made.

[46] Costs should be awarded in this case for two primary reasons:

(a) An application for enforcement orders was made and withdrawn, over eight months after it was filed;

(b) Following the filing of the application, the respondents were obliged to take formal steps to respond to the proceedings, filing a notice of opposition and three affidavits. They also participated in a number of judicial telephone conferences and filed memoranda.

[47] Having found that there should be an award, the question is whether there is cause to depart from 'standard costs', exercising my broad discretion to award what is just in the circumstances.

[48] The respondents do not claim to have prepared for any hearing. A hearing was scheduled for 25/26 July 2019, potential dates for hearing in October were then identified but no hearing occurred. By agreement, the proceedings remained in abeyance after all evidence was filed and while the outcome of the High Court proceedings was awaited. That said, I conclude that the respondents were put to quite considerable expense in having to respond to the proceedings, with evidence having to be prepared quite early in the piece.

[49] Reference to the District and High Court scales of costs is a matter to which regard may be had. Counsel for the applicants calculated scale costs. They ranged from $6200 (District Court) to $14049 (High Court). They provide a useful guide.

[50] I consider that the respondents' legal costs are high for the work undertaken. I

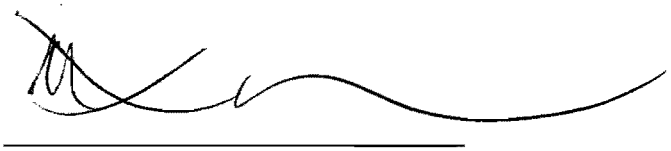
[43] Respondents' response memorandum, paragraph [21].

accept the fees charged by the experts involved in evidence preparation. There is no particular science to the amount that should be awarded and I am not satisfied that costs in the order of 70 per cent of those actually incurred is justified. Bearing in mind that the matter did not proceed to hearing but that evidence preparation and involvement in interlocutory matters was required, I consider that a sum of $20,000 is a reasonable contribution towards the respondents' costs.

Decision

[51] The applicants are ordered to pay $20,000 towards the respondents' costs and expenses.

For the court:



M J L Dickey
Environment Judge