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

Decision No. [2019] NZEnvC 36

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 120 of the Act
BETWEEN	YALDHURST QUARRIES JOINT ACTION GROUP
	(ENV-2016-CHC-049)
	Appellant
AND	CHRISTCHURCH CITY COUNCIL
	Respondent
AND	HAREWOOD GRAVELS LIMITED
	Applicant

Court:	Environment Judge J E Borthwick
Hearing:	in Chambers at Christchurch
Date of Decision:	5 March 2019
Date of Issue:	5 March 2019

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that:

(a) Harewood Gravels Limited is to pay the sum of $20,000.00 to the Yaldhurst Quarries Joint Action Group; and

(b) Christchurch City Council is to pay the sum of $20,000.00 to the Yaldhurst Quarries Joint Action Group.

B: Under section 286 of the Resource Management Act 1991, the District Court at Christchurch is named as the Court this order may be filed in for enforcement purposes (if necessary).

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

REASONS

Introduction

[1] Yaldhurst Quarries Joint Action Group successfully appealed a decision granting resource consent to Harewood Gravels Ltd to establish a gravel quarry.[1] The appellant comprises ten persons, all of whom own or occupy properties within the locality of the proposed quarry.

[2] The Environment Court's decision upholding the appeal and declining consent was unsuccessfully appealed by the applicant to the High Court.

[3] The appellant now seeks an award of costs against the respondent, Christchurch City Council and the quarry applicant, Harewood Gravels Ltd. This decision determines whether there should be an award of costs and if so, the quantum of costs.

The application

[4] The appellant incurred $74,988.00 in costs successfully prosecuting its appeal.[2] A contribution of 90% of the costs incurred is claimed. Those costs are apportioned so that the appellant seeks a contribution of 75% of the costs claimed from the City Council and 25% from Harewood Gravels. If this outcome is not justifiable then the appellant asks the court to adjust the relative apportionment of its costs between the respondent and applicant.

[5] While the appellant has particularised a large number of failings in support of the claim, with two exceptions, I will address only those matters which I consider justify an order of costs being made.

The replies

[6] The City Council provided a detailed response to the application for costs,

[1] [2017] NZEnvC 165.
[2] Memorandum dated 12 December 2018.

submitting if costs are awarded these should be borne by the applicant, Harewood Gravels.

[7] The applicant's primary position is that costs should lie where they fall. The applicant opposes the appellant's 'catch-all' approach to costs wherein if the court was not minded to award 75% of costs against the City Council then the applicant is to pick up the balance. That is because the appellant has clearly stated the grounds in support of an award for costs, the claim against the applicant cannot be amended to cover any shortfall in costs against another party.

[8] Both the respondent and applicant say that if the court is minded to award costs against them, then an award of actual costs in the range of 25-33% is appropriate.

The law

[9] Section 285 of the Act confers a broad discretion upon the Environment Court to order costs, with the sole qualification being that the quantum must be reasonable. The Environment Court does not have any rule or practice that costs will follow the event nor does it have a scale of costs. Costs are ordered not as a penalty, but as compensation where it is just to do so.[3] As with the exercise of any judicial discretion, cost applications are to be dealt with in a principled manner.

[10] As for the amount or quantum of costs awarded, while the Environment Court has declined to set a scale of costs. Costs, when ordered, have tended to fall within three bands. Justice Heath in *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council*[4] noted the bands are not dissimilar to the standard, increased and indemnity costs regime applied by the High Court. Thus:

(a) standard costs in the range of 25-33%;
(b) increased costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[11] It is worth emphasising again that "standard costs" does not infer costs will follow

[3] *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138 at 147.
[4] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468.

the event or that there is a scale of costs – by reference to a percentage – where costs are ordered. Rather, "standard costs" was simply an observation that when made, costs have generally fallen within the range of a 25-33% of costs actually incurred. Recently, Judge Kirkpatrick commented that reliance on percentages of invoiced amounts may give a false sense of precision and an overall award may better reflect, in the round, the justice of the case.[5] I respectfully agree with him. For example, the application of a percentage to a modest claim may penalise the cost-effective manner that a successful litigant has conducted their case.

[12] Where the court has awarded increased costs (that is, above the usual range of costs) it is because there are aggravating factors present in the conduct of litigation. This includes factors identified in *DFC NZ Ltd v Bielby,*[6] most of which are reflected in the Environment Court 2014 Practice Note at clause 6(6). When considering whether to award costs, and the quantum of costs, the court may give weight to circumstances where a party has:

(a) advanced arguments that were without substance;
(b) not met procedural requirements or directions;
(c) conducted its case in a way that unnecessarily lengthened the hearing;
(d) failed to explore reasonably available options for settlement; and
(e) taken a technical or unmeritorious point and failed.

[13] As for factors relevant to awarding costs against a consent authority, in *Pickering v Christchurch City Council*[7] the Environment Court summarised the leading case law as follows:

> For an award to be made against a first instance decision-maker it is not enough that the court did not agree with the initial decision.[8] Because of the important role Councils play and the duties they undertake with the public interest at the forefront, costs are not normally awarded against consent authorities unless its decision is vexatious or frivolous, has little regard for evidence or demonstrates a neglect of duty.[9] The court must be satisfied that the Council has passed the "threshold of blameworthiness".[10]

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[5] *Double R Developments Ltd v Western Bay of Plenty District Council* [2019] NZEnvC 009 at [22].
[6] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.
[7] *Pickering v Christchurch City Council* [2017] NZEnvC 119 at [30].
[8] *Gateway Funeral Services v Whakatane District Council* W022/08.
[9] *Brown v Rodney District Council* W105/99; Environment Court Practice Note at 6.6(c).
[10] *Emma Jane Ltd v Christchurch City Council* C020/09.

Discussion

[14] The appellant sets out the grounds for an award of costs against the applicant, Harewood Gravels, which it says justifies an award of 25%. This quantification is somewhat 'muddled' because the reasons given in support make clear that the appellant is actually seeking increased costs against both the respondent and applicant i.e. costs above the usual range awarded of 25-33%.

[15] The overall sum has been fixed by the appellant at 90% of actual costs incurred. No party suggests those costs are unreasonable, indeed I find they are modest when compared to the usual run of costs applications. The applicant submits that the court, if it has determined that costs are appropriate, must fix the overall sum as a percentage of total costs incurred and apportion that between the two parties. That approach, however, would not reflect the fact that the parties have differently ascribed roles in the attribution of costs and given the comparatively modest sum claimed, it would not adequately compensate the appellant.

[16] I will instead adopt my normal approach which is to decide whether an award is justifiable, and if so then assess the quantum of costs having regard to the parties' respective contribution to the same. As it will transpire, I see no material difference between the respondent and applicant in their respective contributions.

[17] I will address the application for costs against the applicant and respondent under three sub-headings. I note that many more grounds in support of costs were raised but either these are subsumed under the sub-heading "Evidential Inadequacies" or are matters, which even if correct, would not justify any additional cost[11] or are not matters which the court is seized of, so it is unable to make a finding.[12] That said, I have considered all of the grounds raised in support of the application.

[11] Included in this are the allegation that the parties failed to take an objective view on the commercial demand for aggregate, the failure to provide a rehabilitation plan, the imposition of an unusual restriction on residents' rights.

[12] Included in this are the recommendations of the reporting officers.

Issue: whether it is just, in all of the circumstances, to exercise the discretion and order costs in favour of the parties?

Failure of the Council to plan and provide for quarrying in the District Plan

[18] The court expressed serious concerns over the commonality of objectives and policies for the majority of the rural zones. Such an approach appears to leave the outcomes for the different zones to be driven by the rules and this becomes problematic when consent is sought to do something that it not permitted under those rules.[13]

[19] I do not accept, however, the blanket submission that the City Council has failed to plan and provide for quarrying. The City Plan provisions, properly constructed, provided sufficient guidance on this occasion. The risk is that the policy will become increasingly inchoate with the consenting of new activities in the rural zones.

[20] Even so, to award costs on this basis would be to wrongly penalise the City Council for inadequacies in the planning framework.

Failure to explore settlement

[21] The primary relief sought by the appellant was the decline of consent. Alternatively, it proposed an amended set of conditions of consent,[14] seeking, amongst other matters, that access to the site was from a neighbouring quarry. I have not undertaken the exercise of how far apart the parties were on conditions at the close of the hearing; certainly, access from the neighbouring quarry was not proposed. The applicant responds saying settlement was explored during mediation but that in its view, no reasonable option for settlement was presented.

[22] I note that the court also explored ways of reducing the effects of the proposed activity with the applicant and the witnesses, which evidently did not find favour as the proposed conditions were not amended.

[23] Access aside, the conditions proposed by the appellant may not have been approved by the court given our general concern with the technical evidence. Put another

[13] At [35].
[14] Statement of Facts and Issues dated 14 December 2014.

way, it is by no means certain this was a consentable proposal and so I have not given weight to the argument that there was a failure to explore settlement options.

Evidential inadequacies

[24] The appellant submits that because of various inadequacies in the evidence the hearing was unnecessarily lengthened. On the other hand, the applicant argues the key factor contributing to the length of the hearing was the "position" taken by the court and appellant on the topic of respirable silica.

[25] The appellant raised in evidence concerns over respirable silica, and the court directed the applicant to provide supplementary evidence clarifying terms used in an exhibit produced by the applicant's witness.[15] Ultimately the court declined to make any findings on whether there was jurisdiction to consider the effects of respirable silica, the court having decided to uphold the appeal and decline consent on other grounds. Undoubtedly, the direction to produce further evidence on this topic lengthened the hearing but not, I find, unduly so.

[26] I am of the view, however, that the appellant should be compensated for costs incurred as these largely arise from unsubstantiated opinion evidence – this was the result of some witnesses failing to adhere to the Environment Court's 2017 Code of Conduct for Expert Witnesses. I am not saying the witnesses disregarded their duty to the court to impartially assist the court on matters within the expert's area of expertise (clause (7.2(a)) or that they acted as an advocate for the party that engaged them (clause 7.2 (b)). That was not plainly the case. Rather there was a general failure to prepare evidence in accordance with the Practice Note clause 7.3(a) and a specific failure of the witnesses to properly inform themselves about the receiving environment and to assess the cumulative effects of the proposal on that environment. This includes effects from emissions from dust and noise and changes in the rural character of the landscape.

[27] In addition, the planning witnesses did not assist the court to understand the policy framework. In the decision we set out what we regard as best practice in this field. As this was a general failure by all planning witnesses, their opinion evidence is not discussed in the decision.

[15] Minute dated 17 May 2017.

[28] Given the importance of the case to all parties the court took time to understand whether there was evidence in support of the propositions advanced by the applicant and second, whether the opinions of the expert witnesses could be substantiated. For the reasons recorded in the decision we found instead the evidence was deficient. Save in one minor respect the findings of the Environment Court were unsuccessfully challenged by the applicant in the High Court.

[29] This is not a case about the court preferring one party's witnesses over another. Indeed, the appellants did not call technical evidence in support. Rather the appeal was upheld and the consent declined because – as the High Court put it – the evidence in support of a grant of consent "fell short across several fundamental elements of effect".[16]

[30] Given this I find that it is just in all of the circumstances, to exercise my discretion and award costs against both the respondent and the applicant. I note that in *Pickering v Christchurch City Council*, the court awarded against the City Council. The appeal was against a decision to re-consent an existing wind turbine at Gebbies Pass, Banks Peninsula. In deciding to award costs, the court found that the City Council did not make any enquiry into the residents' actual experience of noise from the turbine. Instead, the Council relied on its expert's advice that the effect of noise below the guideline levels in the Standard is always acceptable.[17] The shortcomings in the evidence of the Council's witnesses in this case is not dissimilar as it involves an unwarranted reliance on the desktop analyses without having established the baseline receiving environment including those values contributing towards people's appreciation of the place. In that respect I find that the Council's conduct passed the threshold of blameworthiness.

Issue: quantum

[31] The shortcomings in the applicant's and respondent's evidence were significant and, I find, mutual. In saying that, I decline to fix a percentage to the costs claimed, as they are not only reasonable but modest.

[16] *Harewood Gravels Limited v Christchurch City Council* [2018] NZHC 3118 at [325].
[17] *Pickering v Christchurch City Council* at [33].

[32] In the circumstances, I order the applicant and the respondent to **each** pay costs of $20,000 to the appellant.

J E Borthwick
Environment Judge