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

Decision No. [2019] NZEnvC 38

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to cl14 of the First Schedule to the Act
BETWEEN	HAWKE'S BAY FISH AND GAME COUNCIL
	(ENV-2013-WLG-054)
	Appellant
AND	HAWKE'S BAY REGIONAL COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers at Christchurch
Date of Decision:	8 March 2019
Date of Issue:	8 March 2019

DECISION AS TO COSTS

A: The application for costs by Te Tumu Paeroa (on behalf of the Māori Trustee for Poukawa, a 13B Māori Trust Board) is **declined**.

REASONS

Introduction

[1] Te Tumu Paeroa (on behalf of the Māori Trustee for Poukawa, a 13B Māori Trust Board) ('MTB') was a s274 party to an appeal brought by Hawke's Bay Fish and Game Council ('HBFG') against the decision of Hawke's Bay Regional Council ('HBRC') on proposed Change 5 ('PC5' / 'Decision Version') to the Hawke's Bay Regional Resource Management Plan ('RRMP'). Other s274 parties were Royal Forest and Bird Protection Society of New Zealand ('RFB') and Federated Farmers of New Zealand ('FFNZ'), neither of whom seeks costs.

[2] MTB seeks costs orders against HBRC and HBFG for reasonable contributions towards its total incurred legal costs of $21,770 (including GST).[1]

[3] The appeal was in relation to the PC5 Decision Version concerning the definition of 'wetland' and related provisions. Prior to the hearing, HBFG, RFB and HBRC agreed to modified relief. This essentially resolved matters between HBFG and HBRC. However, FFNZ supported the definition of 'wetland' in the Decision Version and, as a s274 party, opposed the original and modified relief pursued by HBFG. It raised a jurisdictional challenge, the essence of which was that HBFG's original submission to HBRC was not 'on' PC5 and, hence, could not found a valid appeal.

[4] The appeal was heard, both as to jurisdiction and merits, over two days in September 2017. On 10 November 2017, the court issued a decision on the jurisdictional issues ('First Decision').[2] It explained that neither the original nor modified relief was 'fairly and reasonably raised' and hence, neither relief was within the scope of cl14(2) Sch 1 of the Resource Management Act 1991 ('RMA'). However, that decision also found that the definition of 'wetland' could be modified to some extent within the scope of the appeal.

[5] Subsequent to that First Decision, expert witness conferencing occurred. A joint witness statement ('JWS') of the planning and ecology witnesses was produced, dated 17 April 2018. The court held a teleconference on 12 July 2018, to determine how proceedings might be resolved. On 17 August 2018, two memoranda of counsel were filed. One was a joint memorandum on the outcome of the expert conferencing and the court's 12 July Minute. It was signed on behalf of HBFG, RFB, FFNZ and HBRC ('Joint Memorandum'). The other was on behalf of MTB ('MTB Memorandum').

[6] The Joint Memorandum helpfully identified the key consensus outcomes, reported in the JWS, on drafting matters. It attached jointly proposed drafting and a map of Lake Poukawa for inclusion in the RRMP.

[7] The MTB Memorandum set out that party's position on any s293 direction concerning Lake Poukawa. It included requests to have further opportunity to comment

1 Application for costs by MTB, dated 18 October 2018, at [5]. Invoices attached to application for costs.

2 *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187.

on any intended s293 direction and to be involved in any final determination of the 'line' that defines Lake Poukawa wetlands. MTB made recommendations for who should be notified in the event that the court decided to make a s293 direction.

[8] The court was satisfied that the positions put by the Joint Memorandum and MTB Memorandum were fairly supported on the evidence (including the JWS). On that basis, the court proceeded to determine the appeal and the s293 issues.

[9] In its subsequent decision ('Second Decision'),[3] the court noted that the power to extend the court's jurisdiction under s293 should be only exercised cautiously and sparingly. The court referred to findings in its First Decision, and found it would be inappropriate to reject the appeal and confirm the Decision Version *in toto*. The court found that flaws in the public notification of PC5 favoured an approach that confined any RRMP changes, by this appeal, to the RPS component of the RRMP. The court found that modifying the meaning of 'wetland' for the RPS component, such as to restore the previous Glossary definition under the pre-existing RRMP, was the best supported option on the evidence before the court. The court declined the appeal insofar as it sought any change from the Decision Version of the regional plan provisions of the RRMP (other than was required to make consequential changes to the Decision Version definition such as to provide for separate RPS and RRMP definitions). The court considered whether to make a s293 direction for the mapping of Lake Poukawa for the purposes of the entire RRMP. Ultimately, the court declined to make s293 directions.

[10] The court determined that, as compared to PC5's definition of 'wetland', the JWS's proposed definition was more in keeping with the intentions of those RPS objectives and policies that use the word 'wetland'. It was also found necessary to assist understanding of the RPS to reference by name, and define by map, the extent of certain identified wetlands intended to be covered by the RPS.

[11] The court allowed the appeal to the limited extent described in the Second Decision, but otherwise declined it. The court issued directions for an updated full set of provisions required to incorporate the revised definition. Costs were reserved. The court directed any party seeking costs to file a proposed timetable direction for applications and responses, within ten working days of the date of the Second Decision.

[3] *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2018] NZEnvC 192.

[12] MTB lodged an application for costs and proposed that any other party seeking costs should file an application within a further 5 working days, and responses should be filed within a further 5 working days. The court issued a Minute on 26 October 2018 making directions for any further applications and replies to costs applications.

MTB's submissions

[13] MTB acknowledges that, ordinarily, costs are not awarded in plan change appeals but notes that there can be exceptions to this and submits that the present case is one such exception. It submits that, if any of the factors identified in *Bielby*[4] are present, that can warrant such an exception and, in some cases, a higher than usual award. For that submission, it refers to *St Heliers Capital Limited v Kapiti Coast District Council.*[5] It also refers to *Riverside Oak Estate Ltd v Hamilton City Council,*[6] where the court observed that, whilst the list is not exhaustive, each case depends upon its facts:[7]

> ... generally speaking where there has been delay or a lack of clarity about the case presented that results in unnecessary cost to other parties, and this is thought to be unreasonable, the Court has been prepared to depart from the usual position set out in the Practice Note.

[14] In the present case, it identifies the following as circumstances that justify an award of costs being made in its favour:[8]

(a) the failure by HBFG to notify MTB of its appeal and the unnecessary cost incurred by MTB in retrospectively seeking to join the proceedings;
(b) the insufficient notification by HBRC of PC5, which resulted in unnecessary time and costs in the hearing (and subsequent scope submissions) debating the regional plan provisions; and
(c) the success of MTB in these proceedings in relation to ultimately having protection provided to the wet areas surrounding Lake Poukawa in the RPS, as sought by MTB (and which had been sought by MTB long before this appeal).

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4 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).
5 *St Heliers Capital Limited v Kapiti Coast District Council* [2014] NZEnvC 162 at [59].
6 *Riverside Oak Estate Ltd v Hamilton City Council* [2016] NZEnvC 187.
7 *Riverside Oak Estate Ltd v Hamilton City Council* [2016] NZEnvC 187 at [5].
8 Application for costs by MTB, dated 18 October 2018, at [13].

Failure to notify MTB of the appeal

[15] MTB says HBFG did not serve its appeal on MTB. It submits that, as a consequence, it was not aware of the appeal or its ability to join as a s274 party to the appeal (the prescribed form would have advised it of the ability to become a party to the appeal).[9]

[16] As background to this, MTB refers to what it stated in a memorandum of counsel that it filed when it sought to join the proceedings. The memorandum, dated 14 July 2016, was filed after mediation had taken place where the definition of wetland, as it applied to Lake Poukawa, was specifically 'up for debate'. MTB notes that the court issued a Minute following its memorandum, accepting MTB as a party and asking for any party who disputed the memorandum to advise the court. No party did. HBRC expressed support for MTB being joined. A formal waiver application and s274 notice were lodged and accepted.[10]

[17] MTB says it then participated fully as a party and took a responsible and cost efficient approach to the hearing by filing a memorandum setting out the proposed participation of MTB in the hearing and specific relief sought, along with the evidence on behalf of MTB.[11]

[18] MTB says that if it had been notified by HBFG as required under the RMA, at a minimum the initial memorandum of counsel (dated 14 July 2016) would not have been required to be filed. In addition, the s281 waiver would not have been required. As well, if MTB had been able to engage with the initial mediation, this may have altered the degree of involvement that MTB had following mediation.[12]

Insufficient notification by HBRC of PC5

[19] MTB says that it is clear from the court's observations in the First Decision that the notification of PC5 by HBRC was not adequate. MTB referred to observations relating to the development history of PC5, including that there was 'an unfortunately confusing public notice that could well have misled readers'. MTB submits that this defective notice

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9 Application for costs by MTB, dated 18 October 2018, at [14].
10 Application for costs by MTB, dated 18 October 2018, at [15]-[16].
11 Application for costs by MTB, dated 18 October 2018, at [17].
12 Application for costs by MTB, dated 18 October 2018, at [23].

did mislead MTB and unnecessary time and cost was spent in this appeal addressing the issue of the wetland definition in relation to the regional plan provisions, when, as a consequence of the flawed notice, it was not actually possible for the court to make changes to that definition (i.e. for those purposes).[13]

[20] MTB submits that, if HBRC had correctly notified PC5, MTB's involvement may have differed.[14]

How MTB conducted its case and its ultimate success

[21] MTB submits it was successful in its case before the court, to the extent possible. That was given the scope limitations on the court, and the actions of HBFG and HBRC which it says resulted in it incurring unnecessary and unreasonable costs.[15]

[22] MTB explains that it is heavily involved in and invested in the protection of Lake Poukawa, and therefore had no choice but to incur costs to become involved in the court process. It submits that it limited its involvement to the extent possible, in order to limit costs and time for all parties.[16]

HBFG's reply

[23] HBFG notes that MTB acknowledges the presumption from the court's Practice Note that, as a matter of general practice, the court does not award costs to any party in respect of an appeal against a plan change which has proceeded to hearing.[17]

[24] It observes that, nothwithstanding, MTB relies on the *Bielby* factors as reasons to depart from this general presumption. As for MTB's claim that it incurred unnecessary and unreasonable costs from HBFG omitting to serve it with a copy of its appeal, HBFG points out that MTB does not detail how such an (alleged) omission of service is relevant to costs in terms of the *Bielby* factors.[18]

[25] HBFG submits that it ran a responsible and efficient case and did not exhibit any of the *Bielby* factors. Accordingly, HBFG considers there are no reasonable grounds

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13 Application for costs by MTB, dated 18 October 2018, at [19]-[21].
14 Application for costs by MTB, dated 18 October 2018, at [23].
15 Application for costs by MTB, dated 18 October 2018, at [22].
16 Application for costs by MTB, dated 18 October 2018, at [24].
17 Reply by HBFG, dated 9 November 2018, at [3].
18 Reply by HBFG, dated 9 November 2018, at [4]-[6].

based upon case law that support a departure from para 6.6(b) of the court's Practice Note in this case.[19]

Failure to notify MTB of the appeal

[26] HBFG does not accept MTB's claim that it failed to properly serve its appeal. It explains that, due to a number of factors, it has not been able to locate the original email of service to MTB. However, it submits that, on the available evidence, the more reasonable view is that service was duly effected. In support of this position, it attaches a copy of an email from HBFG to the court registrar.[20] The email confirms a list of submitters and the date of service of the notice of appeal on each. HBFG points out that the email records that service was by way of an email sent to Revell Wise. HBFG also attached MTB's submission, which shows that this same email address was stated there to be the address for service.

[27] On that basis, HBFG's primary submission is that it is not fairly accountable for any costs incurred by MTB.[21]

[28] HBFG's alternative submission, in the event the court were to find on balance that it is more likely than not that HBFG failed to serve its notice of appeal, is that any such omission did not contribute to any unreasonable or unnecessary costs being incurred by MTB.[22] Specifically, it submits that, in any case, MTB was not prejudiced in its participation in the resolution of PC5, and did not directly incur increased and unreasonable costs.

[29] Elaborating on that, it submits that MTB would have incurred similar costs in participating in proceedings notwithstanding any omission of service, given how the proceedings evolved. Further it observes that, at the time MTB sought to become involved in proceedings, matters had not formally proceeded to resolution in respect of Lake Poukawa. It submits that the HBRC's approach to further consultation would have remedied any omission to notify MTB of HBFG's appeal. Further, it points out that HBFG provided expert evidence in support of MTB's position relating to protection and mapping of Lake Poukawa as a significant wetland for the Court hearing. In those terms, it says

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19 Reply by HBFG, dated 9 November 2018, at [7]-[8].
20 Reply by HBFG, dated 9 November 2018, at [12]-[14].
21 Reply by HBFG, dated 9 November 2018, at [15].
22 Reply by HBFG, dated 9 November 2018, at [17].

that it potentially reduced the costs incurred by MTB in proceedings.

HBRC's reply

[30] HBRC notes that MTB relies on the *Bielby*[23] factors and two subsequent decisions[24] to justify a departure from the usual position set out in para 6.6(b) of the Practice Note (i.e. that costs will not usually be awarded to any party where an appeal against a proposed change has proceeded to a hearing).[25]

[31] HBRC submits that none of the *Bielby* factors are met in this case:[26]

(a) no arguments were advanced that were without substance;
(b) there was no abuse of the process of the court;
(c) the case was conducted in as efficient a manner as possible, given that there was an argument as to jurisdiction which the court would have to decide at the same time as, or prior to, making a decision as to the relief sought on appeal;
(d) the parties had attended several days of mediation, and in that time, explored the possibility of a settlement. By the time the matter was ready for hearing, the issues in dispute were relatively narrow: the definition of wetland, and whether a map of Lake Poukawa should be included in that wetland definition. HBRC and HBFG sought the inclusion of a map for Lake Poukawa. FFNZ was the party opposing that relief.
(e) neither HBRC not HBFG took a technical or unmeritorious point of defence.

Failure to notify MTB of the appeal

[32] HBRC acknowledges that service should have occurred, but says it was not aware that MTB had not been served. It submits that, as the respondent, it is not under a duty to serve the appeal on submitters, nor to ensure that appeals have been properly served.[27] HBRC also notes that MTB was successful in its application for a waiver of time to join the appeal. It points out that it advised the parties that it would not object to

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23 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).
24 *St Heliers Capital Ltd v Kapiti Coast District Council* [2014] NZEnvC 162 and *Riverside Oak Estate Ltd v Hamilton City Council* [2016] NZEnvC 187.
25 Reply by HBRC, dated 9 November 2018, at [4].
26 Reply by HBRC, dated 9 November 2018, at [5].
27 Reply by HBRC, dated 9 November 2018, at [7].

the MTB being included as a party to the proceedings.[28]

[33] HBRC notes that MTB could have attended the eight days of mediation, had it become a party to the appeal shortly after it had been lodged. However, HBRC submits, that involvement would not have changed the outcomes agreed at mediation, or subsequently. FFNZ had been consistent in its opposition to the inclusion of a map of Lake Poukawa in the RRMP. FFNZ maintained that position even after receiving the memorandum of counsel for MTB and the evidence of Mr Hapuku in September 2016.[29]

Insufficient notification by HBRC of PC5

[34] In response to MTB's submission that it was misled by the public notice into thinking it was possible for the court to make changes to the wetland definition in the RRMP, HBRC points out that other parties incurred time and cost addressing that issue at the hearing, whereas it says MTB did not. It notes that MTB did not have counsel attend and did not call any expert planning evidence at that hearing. HBRC says that Mr Hapuku's evidence did not specially address that issue.[30]

[35] Given the importance of Lake Poukawa to MTB, HBRC submits that MTB's involvement in the hearing would not have differed if the public notice had been more clearly expressed.[31]

MTB's success and its conduct during proceedings

[36] HBRC accepts that MTB was successful in these proceedings in that the definition of wetland in the RPS now includes the wet areas surrounding Lake Poukawa. However, it notes that it also sought the inclusion of the map of Lake Poukawa in the RRMP and had called expert evidence in support of that position, on which MTB relied. As such, it says MTB did not incur any additional costs as a result of HBRC's position on that issue. Rather, it was able to limit its involvement (and so cost) at the hearing in light of the expert evidence called by HBRC.[32]

[37] HBRC responds to MTB's claim that it had taken a 'responsible and cost-efficient approach to the hearing' by filing a memorandum of counsel setting out MTB's proposed

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28 Reply by HBRC, dated 9 November 2018, at [8].
29 Reply by HBRC, dated 9 November 2018, at [9]-[10].
30 Reply by HBRC, dated 9 November 2018, at [17]-[18].
31 Reply by HBRC, dated 9 November 2018, at [21]-[22].
32 Reply by HBRC, dated 9 November 2018, at [19]-[20].

participation in the proceedings. HBRC refers to MTB's memorandum of 23 September 2016, and notes that MTB advised it had decided not to provide its own expert evidence or present legal submissions at the hearing. Instead, it had a representative, Mr Revell Wise, attend to speak to MTB's position and to answer any questions from the court. In addition, Mr Hapuku gave evidence on the matters raised in his statement.[33]

[38] HBRC submits that what is apparent from that memorandum is that MTB did not spend 'unnecessary time and costs in the hearing ... debating the provisions of the regional plan' and nor did it have counsel present at the hearing itself. (Mr Wise's costs are not included in the sum MTB is seeking to recover).[34]

[39] In addition, HBRC submits that the relief sought by MTB was also sought by both HBFG and HBRC and was ultimately granted by the court. It also says that it was FFNZ's opposition, rather than the position taken by HBRC and HBFG, which required the matter to be decided at a hearing.[35]

[40] HBRC notes, with respect to the argument about scope, there were three other parties – HBRC, HBFG and RFB – arguing that the court had jurisdiction to make the changes sought to the definition of wetland in both the RPS and the regional plan. As such, it says MTB need not have filed submissions on its own account. Draft submissions had been exchanged by MTB, HBRC and HBFG prior to lodgement. HBRC says that, while MTB was entitled to lodge submissions on that issue, having done so it cannot now say that any other party should contribute towards the costs arising from that decision.[36]

[41] HBRC observes that there is no way of knowing whether MTB would have wished to be involved in a preliminary hearing as to scope (if the court had decided to have such a hearing). It submits, however, that it is unlikely that its evidence to the court would have changed, regardless of the outcome of a preliminary hearing.[37]

FFNZ's reply

[42] FFNZ is neutral on MTB's costs application.

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33 Reply by HBRC, dated 9 November 2018, at [12]-[13].
34 Reply by HBRC, dated 9 November 2018, at [14].
35 Reply by HBRC, dated 9 November 2018, at [16].
36 Reply by HBRC, dated 9 November 2018, at [23]-[24].
37 Reply by HBRC, dated 9 November 2018, at [27].

Jurisdiction and related principles

[43] Jurisdiction to determine costs is found in s285 RMA. Section 285(1) relevantly provides the following discretion:

> 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.

[44] That discretion is broadly expressed. As parties note, the court is guided by a body of general principles developed through case law and summarised in the court's Practice Note.[38] In particular, the Practice Note says:

> **6.6 Costs**
> The following issues are relevant to the practice of the Court in considering costs issues:
> ...
> (b) Where an appeal against a proposed policy statement, plan, or plan change under Schedule 1 to the RMA has proceeded to a hearing, costs will not normally be awarded to any party.

[45] MTB refers to the *Bielby* factors, but does not say which it believes has been met or engaged.

Consideration

Is an award against HBFG justified?

[46] For several reasons, I am satisfied no costs award is appropriate against HBFG.

[47] Firstly, I agree with HBFG that MTB has not sufficiently substantiated its assertion that it was not served with the notice of appeal in the face of what records indicate. That includes the copy of MTB's submission to HBRC on the plan change (provided by HBFG). It records that the 'contact person' for the submitter is Revell Wise and also records his postal and email addresses. Together with this is a copy of HBFG's email to the Registrar, dated 26 July 2013, reporting that a copy of the notice of appeal had been served on its listed submitters and recording this had, on 27 July 2013, been served on Revell Wise at an email address noted as revell.wise@maoritrustee.co.nz.

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38 Environment Court Practice Note 2014, at para 6.6.

[48] Section 352 RMA pertains to service of documents. Section 352(1)(a) relevantly requires that, where a notice or other document is to be served on a person for the purposes of the RMA, it must be served by sending it to an electronic address if the person to be served has specified such an address (and has not requested one of the other methods of service in s352(1)(b)). While s352(1AA) specifies that s352(1) does not apply "if the court, whether expressly or in its rules or practices, requires a different method of service", I find no relevant such exclusion in this case. In particular, the specifications in s352(1) are not excluded or relevantly qualified by the court's Practice Note nor, insofar as I am aware, by any relevant direction. Section 351(1) does not override the provisions of the Electronic Courts and Tribunals Act 2016 ('ECTA'), but nothing therein excludes or relevantly qualifies the application of s352(1).

[49] Had MTB advised of a different address for service than that specified in MTB's submission on the proposed RRMP, that would have borne on this issue. However, on the information before me, I find nothing that satisfies me that it did so. Given that MTB's submission on the proposed RRMP entitled it to join the proceedings under s274, I find HBFG acted reasonably and in accordance with its service obligations under s352 in emailing its notice of appeal to the electronic address that MTB stated in that submission.

[50] The ECTA provides for when "a document, including its associated process, in electronic form that is made by, or for use in, a court or tribunal" (termed a 'permitted document') is taken to be dispatched and received. Under s29, a permitted document is taken to be dispatched at the time it first enters an information system outside the control of the originator. Under s30, it is taken to be received "at the time the permitted document first enters the information system that the addressee has designated for the purpose of receiving the permitted document". On the information before me, I cannot draw any safe conclusions about whether and, if so, when, the electronic copy of the notice of appeal was dispatched and received. However, it is not necessary for me to do so. Rather, the relevant issue on the costs application is whether HBFG bears some accountability for anything that went wrong there.

[51] There are a range of potential reasons why intended electronic service of the appeal could have gone astray. Some technical problem is one possibility, whether at HBFG's end or Mr Revell's. Human error is another possibility, again potentially at HBFG's end or Mr Revell's (e.g. error in addressing before dispatch or in monitoring or managing emails upon receipt). In making the assertion that HBFG bears responsibility for costs, it is incumbent on MTB to back that assertion with some reliable evidence. On

everything before me, I cannot reasonably be satisfied that HBFG bears any such responsibility.

[52] Even if I am wrong about that, I am satisfied that, insofar as MTB incurred further costs in joining the proceedings late, such costs are not fairly attributable, even in part, to HBFG's part in the appeal proceedings.

[53] One matter I observe on this point is that MTB's interest in the proceedings, as identified in its s274 documentation, was relatively confined. Its s274 notice explains that interest was in opposing HBFG's related relief "to the extent it excludes Lake Poukawa and the 'intermittently wet' area around the Lake from the definition of 'wetland'." It is speculative and unhelpful to contemplate whether, had MTB been able to join the mediation, it could have secured agreement with other parties such as to save it procedural costs.

[54] One fair observation is that, by the time the matter was ready for hearing, the issues in dispute were relatively narrow: the definition of wetland, and whether a map of Lake Poukawa should be included in that wetland definition. It is also fair to observe that HBFG (and HBRC) sought the inclusion of a map for Lake Poukawa (whereas FFNZ was opposed that relief).

[55] What can also be fairly observed is that the final outcome gives recognition to Lake Poukawa, albeit in a context where the scope of change to the RRMP was significantly confined as compared to the relief in the appeal (and the modified relief then pursued by other parties, as noted). I do not accept HBFG's submission that it supplied evidence *in support of* MTB's position nor that its evidence *saved* MTB costs. Rather, HBFG supplied evidence in support of its own position. However, nor is there any sound basis to say HBFG's approach caused MTB to have incurred extra costs. It was MTB's election to call relatively confined evidence, although as the Second Decision notes, that evidence was persuasive of the final outcome, being an outcome reflective to some extent of MTB's stated interest (and which HBFG and HBRC did not materially oppose during the hearing).

[56] Hence, while fault can be found in how HBFG framed its appeal and initially pursued relief beyond scope, I find that does not warrant a costs response (having had regard to the *Bielby* factors).

Is an award against HBRC justified?

[57] I have already addressed this question to some extent in my findings concerning HBFG. The relevant additional question is whether HBRC should be answerable in costs for defects in its public notice calling for submissions on the RRMP.

[58] An initial point is that the s285 discretion, whilst broadly expressed, pertains to proceedings before the court. It does not entitle the court to award costs in respect to any defects in first instance processes before a local authority.

[59] In any case, on the basis of the information before me, I find no sound basis to find that MTB suffered any undue cost at first instance as a consequence of HBRC's defective public notice. The First Decision describes the public notice as "unfortunately confusing". It observes that its potential flaws were such as to have posed a potential risk of disarming some "to assume that PC5 would not result in any change to the regional plan component of the RRMP". On the face of MTB's submission to HBRC on the RRMP, MTB would not appear to have been materially disarmed. Rather, its carefully worded submission identifies the specific PC5 provisions that it pertains to, explains MTB's interests in and concerns as to the management of Lake Poukawa, and then details how this pertains to each identified PC5 provision of interest to MTB. I am satisfied, on this basis, that the defects in the public notice did not have any detrimental cost-related consequences for MTB.

[60] Turning to the appeal proceedings, the proper focus is on whether MTB incurred any extra costs as a consequence of how HBRC conducted its case. An aspect of HBRC's case that the First Decision finds fault with is the modified relief that HBRC agreed to with HBFG and RFB. FFNZ opposed that modified relief, as the First Decision also explains, but does not seek costs. In my reasoning concerning why I have declined MTB's claim for costs against HBFG, I discuss the relatively narrow nature of MTB's case in the appeal proceedings. Similarly, I find the fact that HBRC supported the modified relief did not have any consequence in costs. Rather, on the matters concerning Lake Poukawa, the modified relief left MTB in materially the same position as it was in relation to HBFG's initially pursued relief. That position was not made materially worse (in a costs sense) by the case HBRC ran. In particular, its evidence did not materially impede MTB in pursuit of its relief. Rather, within the confined available scope for relief, and on its confined evidence, MTB was relatively successful.

[61] I have already explained why I find that, in other respects, HBRC's case was not conducted in a way that should fairly trigger a costs' consequence in relation to MTB.

Outcome

[62] MTB's application for costs awards against HBFG and HBRC is **declined**.

J J M Hassan
Environment Judge