

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision No. [2020] NZEnvC 119

IN THE MATTER of the Resource Management Act 1991
AND of an application for orders for rehearing of
proceedings SKP Inc v Auckland Council
[2018] NZEnvC 081 under s294 RMA

BETWEEN SKP INCORPORATED
(ENV-2018-AKL-000174)
Applicant for rehearing

AND AUCKLAND COUNCIL
Respondent

AND KENNEDY POINT BOATHARBOUR
LIMITED
Consent Holder

Court: Alternate Environment Judge L J Newhook (previously Chief
Environment Court Judge)

Hearing: On the papers

Representation: J Gardner-Hopkins for Applicant
M Allan and R Smith for Respondent
V Morrison-Shaw for Consent Holder

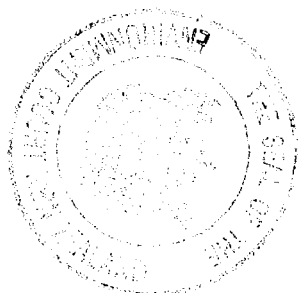
Date of Decision: 7 August 2020

Date of Issue: 7 August 2020

DECISION OF THE ENVIRONMENT COURT ON APPLICATION BY SKP TO
SUSPEND TIMETABLE FOR DETERMINATION OF COSTS ON EARLIER
SUBSTANTIVE HEARINGS

A: Application for suspension refused.

SKP Incorporated v Auckland Council



B: Costs reserved.

REASONS

Introduction to the suspension application by SKP

[1] On 17 July 2020, SKP filed an application for leave to appeal to the Court of Appeal from a decision of the High Court dismissing an appeal from a decision of the Environment Court refusing a rehearing under s294 RMA of its own earlier decision granting consent to the establishment and operation of a boat marina at Waiheke Island.¹²³ The present application for suspension of costs timetable is the second in this Court, the first having been successfully made by SKP and agreed to by the Court in a Minute dated 11 February 2020, in which I recorded:

The Judge has considered the several memoranda about the costs timetable. With some reluctance, he concludes that Judge Dwyer's reasoning in the Okura case may still remain applicable here and the costs timetable is therefore suspended in all respects.

However, bearing in mind paragraph 11 of Ms Morrison-Shaw's memorandum of 3 February, if the costs applicants perceive delay in the High Court proceedings by SKP, they have leave to seek reversal of the suspension I have ordered today.

[2] The present application has been made more formally, hence this decision. SKP seeks:

- a) The Environment Court suspend the timetable in respect of costs (including SKP's response as the next step in the timetable) pending:
 - i) The determination of the application for leave to appeal should leave be declined; or
 - ii) The determination of the appeal to the Court of Appeal should leave be approved; and

¹ *SKP Inc v Auckland Council* [2020] NZHC 1390, 19 June 2020.

² *SKP Inc v Auckland Council* [2019] NZEnvC 199.

³ *SKP Inc v Auckland Council* [2018] NZEnvC 081.



- b) That SKP provide its response/reply to the costs applications within ten working days of either i) or ii) above occurring, whichever is the sooner; and
- c) That no decision on costs be made in the meantime.

[3] The decision of Judge Dwyer referred to above was *Zhi Li & Ors v Auckland Council*.⁴

[4] Somewhat summarised, Judge Dwyer had held that the issue of whether costs applications are determined or put on hold pending the outcome of a High Court appeal against a primary decision, is a matter to be determined by the Court in light of all applicable circumstances in any given instance.⁵

[5] He also accepted that it is preferable for costs applications [generally] to be determined while circumstances are fresh in the Court's memory; but he also held that in the case before him the merits had been comprehensively discussed in the substantive decision which would provide a more than adequate *aide memoir* should one be required.⁶

[6] Judge Dwyer held in that instance that the circumstances before him, unless costs were awarded to the [successful appellant society] it might have difficulty participating in the High Court proceedings that had been brought by the unsuccessful landowner.

[7] In the present instance, SKP submitted through counsel that neither KPBL nor the Council have claimed that they might have difficulty in participating in the Court of Appeal proceedings if costs were not awarded. (Which seems to me to be trite). He submitted that the Okura reasoning at paragraph 8 was applicable in the present instance (the "*aide memoir*" point). He also submitted that this Court has a wide discretion in all applicable circumstances before it, including as to the potential implications of SKP's Court of Appeal proceedings on the Environment Court proceedings.

[8] Counsel then proceeded to rehearse arguments it seems he is advancing to the Court of Appeal in support of the application for leave. I doubt the appropriateness of

⁴ [2018] NZEnvC 156.

⁵ *Zhi Li* at paragraph [7].

⁶ *Zhi Li* at paragraph [8].



such rehearsal and am not persuaded to prejudge the strength or otherwise of SKP's application to the Court of Appeal in any way.

[9] Addressing that part of SKP's present application that seeks further time to respond to the costs applications on this Court's 2018 and 2019 decisions, counsel endeavoured to persuade me that it was not necessarily reasonable that SKP should have undertaken this work pursuant to the timetable I had set. He pointed to matters in the affidavit in support of Mr DJ Baigent on 15 July 2020, and difficulties for SKP as an incorporated society of volunteers operating in a COVID-19 environment; and accusing KPBL and the Council of an inappropriate "rush" to revive their costs applications after the High Court had dismissed SKP's appeal.

The responses by the Council and KPBL

[10] The Council submitted that granting of leave by the Court of Appeal is by no means certain. Its counsel recorded that it had moved from its earlier position of neutrality, to one of opposition to suspension.

[11] It submitted that it is now over two years since the Council filed its first costs application, and its second application had been on the books for 7 months concerning the aspects discovery, adjournment, appointment of a Maori Land Court Judge, recusal and the rehearing application.

[12] The Council has become concerned that SKP might not have funds to meet awards of costs in this Court (and in the High Court) – costs which would otherwise fall on the ratepayer in the case of the Council.

[13] Mr Allan submitted that this Court is not required to defer costs pending resolution of a High Court appeal or a subsequent application for leave to the Court of Appeal. He noted Judge Dwyer's statement in *Zhi Li*⁷ that whether costs applications are determined or put on hold pending the outcome of a higher court appeal is a matter to be determined in light of all applicable circumstances. He submitted the discretion is a broad one and the three reasons applicable in *Zhi Li* should not be considered a "checklist". The latter submission is consistent with the first and I agree with them both and consider them

⁷ *Zhi Li* at paragraph [7].



sound at law.

[14] The Council's submission stressed that much time has already gone by and could extend significantly, particularly if leave is granted by the Court of Appeal. I find these matters to be self-evident, although not determinative on their own.

[15] Perhaps more tellingly, Mr Allan submitted that SKP had been entitled to pursue an appeal to the High Court as of right without need for leave, whereas the latest step requires leave.

[16] Finally, he submitted that the Council is becoming increasingly concerned that SKP may be impecunious and unable to meet the mounting potential costs liabilities. He pointed to the affidavit of Mr Baigent who deposed that in recent days SKP had been having to "*assess resources both financial, personnel and community support/engagement to undertake further steps*".⁸ Further, that "*fundraising arrangements to ensure we have financial resources to undertake any proposed further steps*"⁹; and "*discussions with persons who might be in a position to donate to SKP's costs in pursuing any further appeal*".¹⁰

[17] The Council has conducted a search of the Incorporated Societies Register against the backdrop of the requirement of s23 Incorporated Societies Act 1908 to deliver annual financial statements to the registrar, including as to income and expenditure, assets and liabilities, mortgages charges and securities; all certified by an officer of the society as to approval by members of the society at a general meeting.

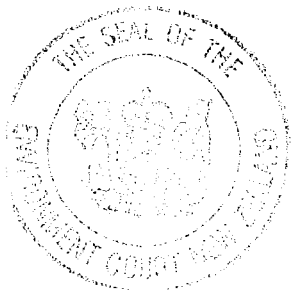
[18] The search of the register revealed that SKP has apparently not filed any statements since it was incorporated in June 2017. The only document on the register is SKP's original 2017 application to incorporate the society.

[19] I find the lack of record keeping and maintaining of the register troubling. I also note that a party "giving consideration to fundraising, donations and community support/engagement", are not the same thing as actually doing those things.

⁸ Affidavit of DJ Baigent paragraph 8(c).

⁹ Affidavit of DJ Baigent paragraph 8(d).

¹⁰ Affidavit of DJ Baigent paragraph 6.



[20] Counsel for the consent holder KPBL, accepted that detailed substantive decisions of the Environment Court may assist determination of costs in the manner of an *aide memoir*, but submitted that there can be other factors such as how the proceedings were conducted by the parties which might not necessarily be fully captured in the decisions. Counsel noted that this could particularly be the case in the present instance given the number of procedural and interlocutory matters raised in the rehearing proceedings. I accept these submissions in the circumstances of this litigation. She submitted that in the present case it would be more efficient and appropriate for the Court to determine the applications now, particularly as one of them is over two years old. She submitted that SKP had overstated the impact of circumstances that favoured a suspension and had failed to mention other relevant factors which I now address.

[21] Concerning the claim by SKP that there might be substantive and costs implications for its current application to the Court of Appeal for leave, such could only be said to apply in respect of the rehearing application, as that is the only proceeding to which the application for leave relates. This was submitted to be even more definitive in relation to the 2018 proceedings, because even if SKP's appeal was reheard, it would not necessarily follow that any costs orders made in respect of that hearing would need to be revisited. This, on the basis that if successful on appeal to the Court of Appeal, the outcome would not necessarily exculpate a party who failed at first instance from bearing the consequences of a poorly pleaded or managed case. I follow the logic of these submissions.

[22] Like the Council, KPBL submitted that considerable time could continue to flow in connection with the approach to the Court of Appeal. I agree that is likely.

[23] Concerning time or capacity to respond, KPBL noted that SKP had already filed its response to the 2018 costs applications; and that it had had about six months to respond to the costs applications re the rehearing, discovery, adjournment, recusal and waiver.

[24] KPBL pointed to the issues of want of filings of annual financial statements with the Registrar of Incorporated Societies, and to the uncertainties surrounding the claims of its deponent about possible donations or fundraising.



[25] KPBL submitted that the approach being taken by SKP effectively places the burden of its failed litigation (unsuccessful at every level, Council, Environment Court and High Court to date), on the successful parties. It submitted that it would be unreasonable to continue to allow it to extend its litigation with no financial consequences.

[26] Just as I was finalising this decision today, I received a memorandum from SKP's counsel expressing anxiety about allegations by the other two parties about SKP's possible financial position. He sought that if I was to place any weight on the allegations, I grant leave first for SKP to respond.

[27] This development is in itself most unsatisfactory. The submissions of the other two parties were received almost 2 weeks ago. Counsel asserts that "SKP has met all of its costs to date and that it is no secret that it has done so through fundraising". He also asserts that the situation with reporting to the Incorporated Society's Registrar is irrelevant to SKP's (proven) ability to meet its costs.

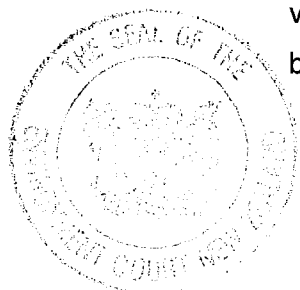
[28] I find that the financial issues are not determinative of the current application, so while I doubt some of what Mr Gardner-Hopkins has placed before me today, I do not need to consider allowing SKP yet more indulgence.

[29] I find in favour of the detailed submissions of KPBL analysed in paragraphs [20] to [23] above, and the submissions of KPBL and the council about time that has passed already, time likely to go by in the approach of SKP to the Court of Appeal, and the point that leave is needed for the latter in contrast to the right to appeal to the High Court already exercised. These matters weigh more strongly in the exercise of the current discretion than the matters raised by SKP discussed above. There comes a time when the privilege to litigate needs to engage some of the obligations cast on parties by the legislation.

An alternative proposal by the Council

[30] The Council submitted that should the Court decide to grant further suspension of the costs timetable, it could direct SKP to pay an appropriate sum of money into a solicitors' trust account (with appropriate supporting undertakings) or pay funds to the registrar of the Court as security.

[31] I do not favour those courses, because I find that the time has come for the Court to consider the costs applications that are before it (without in this decision coming to a view as to whether there should be costs awards at all), and if awards are then found to be appropriate, the financial reckoning being taken in that more definitive way.



Conclusion

[32] First time round the Council adopted a neutral stance on suspension and I granted SKP's request expressly with some reluctance. The neutrality of the Council has evaporated, and I have needed on this occasion to examine the latest request for suspension more formally and closely. That I have done, and for the reasons given during the course of this decision, I refuse it. I will proceed separately to consider the costs applications, noting that SKP has filed its response in respect of the 2018 application, and now giving it (I think rather generously) another ten days from the date of this decision to file and serve its response to the 2019 applications.

[33] Costs on the present suspension application are reserved.

For the court:



L J Newhook
Alternate Environment Judge

