BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 127

IN THE MATTER	of the Resource Management Act 1991
AND	of Plan Change 5A to the Regional Plan Water for Otago
BETWEEN	LINDIS CATCHMENT GROUP INCORPORATED
	(ENV-2016-CHC-61)
	Appellant
AND	OTAGO REGIONAL COUNCIL
	Respondent

Court:	Environment Judge J R Jackson Environment Commissioner K A Edmonds Environment Commissioner R M Bartlett
Hearing:	In Chambers at Christchurch
Date of Decision:	14 August 2020
Date of Issue:	14 August 2020

COSTS DECISION

A: Under section 285 Resource Management Act 1991 the Environment Court declines the application by the appellant for costs against the Otago Fish and Game Council.

B: Costs are to lie where they fall.

REASONS

Introduction

[1] This proceeding concerns an appeal by the Lindis Catchment Group Incorporated ("LCG") on the Otago Regional Council's decision on Plan Change 5A regarding a flow management regime for the Lindis River which sets a minimum flow and primary allocation of water. A related direct referral application[1] for a suite of water permits to take water from the Lindis River was heard at the same time however separate decisions[2] were issued.

[2] In its Interim Decision[3] on PC5A issued on 7 October 2019 the court reserved its decision as to costs and did not set a timetable for costs application. LCG has now applied for costs in relation to the PC5A proceeding from the principal section 274 party, the Otago Fish and Game Council ("Fish and Game"). It does not seek costs for its application for water permits.

[3] LCG seeks[4] costs of $195,184.05 (including GST) as set out in the affidavits of Ms S McKeague and Mr M Hickey[5] and invoices attached to its application for costs, being approximately 62% of costs incurred in relation to this appeal.

[4] Fish and Game has not lodged full submissions in reply. Instead Fish and Game lodged a memorandum[6] from counsel opposing LCG's application for costs, arguing it should be declined due to the significant delay (approximately six months after the issue of the Interim Decision) in filing and associated prejudice to Fish and Game. LCG filed a memorandum in reply[7] providing reasons for the delay and arguing the application should be decided on its merits.

[5] It is rather unclear as to what procedure Ms Baker-Galloway, counsel for Fish and Game, wishes us to adopt. The LCG says the Fish and Game memorandum amounts

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1 ENV-2018-CHC-155.

2 Three decisions have been released in relation to the PC5A appeal: [2019] NZEnvC 166, [2019] NZEnvC 174 and [2020] NZEnvC 85. [2019] NZEnvC 179, the interim decision on the water permits appeal, was issued on 9 November 2019.

3 [2019] NZEnvC 166.

4 Costs application on behalf of LCG dated April 2020.

5 Affirmed 16 and 19 June 2020 respectively.

6 Memorandum on behalf of Fish and Game dated 21 May 2020 [3].

7 Dated 20 December 2017.

to an informal application to strike out the LCG application for costs, and that is certainly one path forward.

[6] We consider there is a more expeditious way forward which is to consider the application for costs on the merits (without hearing fully from Fish and Game on all issues) because in the circumstances we are not persuaded that we should exercise our discretion to award costs to LCG. We give our reasons below.

The law

[7] Section 285 of the Act provides that 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.

[8] Two of the fundamental principles that have developed through case law are that there is no general rule that costs should follow the event (even if a party is successful); and that costs are not to be awarded as a penalty but in the interests of "compensation where that is just"[8]. We also note that it is unusual for a costs award to be made regarding plan change procedures and that in such a case a "high threshold" must be met[9].

[9] The court has a broad discretion when considering an application for costs, it may consider a number of factors including the arguments brought and the actions of the parties. An application received outside the default period (pre-Practice Note commonly considered to be 20 working days) is at risk of being considered 'stale'[10]. However, a delay in filing does not automatically rule out an award, especially when there are valid reasons for such a delay[11].

[10] LCG relies on the *Bielby* factors which have frequently been referred to by the court when determining an application for significant costs but have also been helpful when considering whether costs ought to be awarded at all. These factors originate from *DFC NZ Limited v Bielby*[12], where the High Court stated that higher costs could be awarded in the following circumstances[13]:

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8 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
9 Practice Note Clause 6.6(b); *Thomas v Bay of Plenty Regional Council* A60/08.
10 *Antunovich v Marine Helicopters* A005/95.
11 *Morley v Taupō District Council* A122/2000 [9].
12 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.
13 These factors have effectively been codified in the Environment Court Practice Note 2014 at 6.6(d).

(a) whether arguments are advanced which 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 a hearing;
(d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;
(e) where a party takes a technical or unmeritorious point of defence.

Consideration

[11] In this case the most relevant factors are:

(1) the decision of the Council's commissioners and the support given to that by Fish and Game;
(2) Fish and Game's evidence about and legal reliance on, in submissions and cross-examination, something called the "synthetic model" (of flows in the Lindis River);
(3) LCG's delay in making the application;
(4) public interest considerations.

Fish and Game's support for the Council decision

[12] The commissioners appointed by the Council decided that the minimum flow in the Lindis River at the Ardgour Road Flow Recorder should be 900 l/s. That is a considerably greater volume than the flow contended for by LCG and ultimately accepted by the court in its Interim Decision.

[13] Unusually, but certainly not without precedent, the Council did not defend its position. When the Council changed its position, Fish and Game was left with the primary burden of defending the decision. It was supported by a number of other section 274 parties who were also concerned that the Council was not defending its decision and the court was grateful to Fish and Game's counsel (led by Ms Baker-Galloway) for her assistance to those parties.

[14] Those considerations strengthen the argument that Fish and Game should not have to pay any costs.

The "synthetic model" issue

[15] Counsel for LCG first set out the chronology of events in the lead up to the hearing in November 2018 and January 2019 to identify where increased costs were consequently incurred and summarises the key issues as follows[14]:

(a) the surprise production of the "synthetic" model by Mr Rekker in his evidence-in-chief for Fish and Game;
(b) reliance on the synthetic model in the evidence-in-chief from other Fish and Game witnesses;
(c) the introduction of new flow scenarios based on the synthetic model, but not previously identified by Fish and Game during previous expert witness conferencing (despite there being express opportunity to do so);
(d) the effect of some of Fish and Game's witnesses departing from prior agreed criteria or processes from the earlier joint witness conferences.

[16] LCG details how the synthetic modelling impacted the production of further evidence, the impact on subsequent hydrological conferencing and the length of hearing. LCG says the "synthetic" model represented a significant divergence in the approach to the longitudinal modelling that had previously been agreed to. Counsel submits that LCG's witnesses "systematically debunked the utility of utilising synthetic inflow data when observed data is available" (a position ultimately agreed upon by the court)[15] and that Fish and Game's witnesses[16] did not comply with their obligations as experts to seek to resolve the differences between them within their fields of expertise. Instead they undermined consensus already reached through mediation and conferencing. LCG submits[17] that as a result of the production of the "synthetic" model by Mr Rekker and the change in position to the depth criteria for fish passage, five days of the hearing would not have been required as there should have been much wider consensus and understanding of the key issues.

14 Costs application on behalf of LCG dated April 2020 [21] and [22].
15 [2019] NZEnvC 166 [254].
16 Costs application on behalf of LCG dated April 2020 [34]-[36].
17 Costs application on behalf of LCG dated April 2020 [46].

[17] Counsel referenced a number of cases[18] where costs were awarded against section 274 parties where a party continued to pursue an argument which was not reasonable to support its case, where matters were essentially re-litigated, or where other *Beilby* factors were present.

[18] LCG says Fish and Game's production of the "synthetic" model was akin to "re-litigation" given it was produced following witness conferencing where modelling methodology was agreed. LCG further submits[19] that Fish and Game must have known that it was continuing to rely on evidence that had not been agreed to, even by its own experts, and that by continuing to rely on that modelling throughout the hearing it would be vulnerable to an award of costs if that evidence was not accepted by the court.

[19] LCG submits[20] that Fish and Game's behaviour demonstrates three *Bielby* factors:

(a) that an argument has been advanced without merit or substance;
(b) that Fish and Game ran an incoherent case that unnecessarily lengthened the hearing; and
(c) Fish and Game failed to explore the possibility of settlement where a compromise could have been reasonably expected.

[20] It is submitted[21] the introduction of the "synthetic" model which was given "no weight" by the court[22] and unreasonably added to the cost and complexity of the proceeding means an award of costs is justified.

[21] We (or at least a majority of us) generally agree with those submissions. For Fish and Game its witness Mr Rekker produced a separate model – the synthetic model – which could not be directly compared with the previously agreed data-driven model which all witnesses, including him, had been relying on for making their predictions. At the final expert witness conference about one week before the hearing, the experts agreed that

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18 *Hemi v Waikato District Council* [2011] NZEnvC 226; *Wellington Badminton Association Incorporated v Wellington City Council* [2012] NZEnvC 249; *Mangawhai Harbour Restoration Society Incorporated v Northland Regional Council* [2013] NZEnvC 245.

19 Costs application on behalf of LCG dated April 2020 [61].

20 Costs application on behalf of LCG dated April 2020 [69].

21 Costs application on behalf of LCG dated April 2020 [10] and [11].

22 [2019] NZEnvC 166 [254].

the "Galleries" scenario (using the refined methods from Ms Houlbrook) was "closer to the truth" than the synthetic model.

[22] Although we have not heard from Fish and Game, we have little doubt that the complications of the synthetic model added days to the hearing, and that needs to be taken into account when deciding costs.

Delay in applying for costs

[23] Fish and Game argues the application for costs should be declined because[23]:

(a) the PC5A decision was issued on 7 October 2019 so any application for costs should have been filed by 21 October 2019 in accordance with the default position set out in the Practice Note (clause 6.6(f));
(b) LCG did not seek any waiver of time nor seek to reserve its position as to costs after the PC5A decision was issued;
(c) LCG never communicated to Fish and Game in respect of costs;
(d) the application was filed 128 working days after the PC5A decision was issued;
(e) LCG did not (initially) provide any explanation for the delay;
(f) the delay is "significant and unreasonable"; and
(g) Fish and Game will suffer significant prejudice due to this delay and lack of communication.

[24] Counsel referred us to decisions[24] where a delay of 4-6 months was considered too long and costs awards were not made by the court. A recent decision *Queenstown Airport Corporation Limited*[25] considered the issue of delay and prejudice in relation to the late filing of a costs application. There the Environment Court adopted the principles set out by the Supreme Court in *Almond v Read*[26] which included length of delay, reasons for delay, conduct of parties and where there is any prejudice to any party.

[25] Counsel notes LCG did not initially give reasons for the delay in filing and the

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23 Memorandum on behalf of Fish and Game dated 21 May 2020 [11].
24 *Central Otago District Council v Flanagan* [2018] NZEnvC 1; *Corran School Trust Board v Auckland City Council* A77/2005.
25 *Queenstown Airport Corporation Limited* [2018] NZEnvC 248.
26 *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801; (2017) 23 PRNZ 533 [38].

prejudice to Fish and Game is set out in the affidavit of Mr I N Hadland[27] with regards to its financial planning. Mr Hadland deposes[28] that if a costs award of the nature sought by LCG is granted that "the budgeting, forecasting, strategic planning and operational planning undertaken over the last 6 months, both for Otago and nationally…will have to be redone." Counsel submits the considerable delay in filing means the matter is now stale.

[26] LCG says that it did not apply for costs earlier because[29]:

(a) the PC5A appeal and water permits appeal had for all intents and purposes been dealt with as one and it would have been highly inefficient to make an application for costs in relation to one appeal when LCG initially intended to apply for costs in relation to both;
(b) following the issue of the interim decision on PC5A further work was required and therefore costs to be incurred; and
(c) ongoing negotiations between parties meant that LCG did not want to jeopardise the possibility of reaching agreement by provoking Fish and Game with an application for costs.

[27] Counsel notes that while it has not strictly complied with the default timetable set out in the Practice Note, the Practice Note has not been drafted to deal with the complexity of the present proceedings where two appeals are inextricably linked, yet to be concluded and have been appealed to the High Court by Fish and Game anyway. LCG contends that, while it did not seek an extension for filing or otherwise indicate to Fish and Game that it intended to apply for costs, if it was of such critical importance to Fish and Game it should have sought confirmation from LCG.

[28] LCG says[30] Fish and Game has not suffered any prejudice as risk of unexpected cost is the nature of any litigation and whether it is just to award compensation to LCG has little to do with what the administrative difficulty for Fish and Game in budgeting for it.

[29] LCG explains the delay in filing on the fact that the PC5A appeal and water

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27 Dated 21 May 2020. Mr Hadland is the Chief Executive of Otago Fish and Game.
28 Affidavit of I N Hadland dated 21 May 2020 [15].
29 Memorandum of counsel for LCG dated 5 June 2020 [11].
30 Memorandum of counsel for LCG dated 5 June 2020 [31].

permits appeal "comprised of two inextricably linked parts"[31]. However the Act expressly states[32] there is a presumption against awarding costs against a person who is a party under section 274(1) in direct referral proceedings (like the water permits appeal), so this factor works in Fish and Game's favour rather than against it.

Outcome

[30] There are a number of unusual aspects to this case. The first is that the respondent Council did not defend its position on the minimum flows in the Lindis River but put forward a quite substantially amended position which allowed a substantially lower flow. The parties who might have expected the Council to defend its position should be given considerable leniency for defending a position which the ORC had earlier adopted in its decision.

[31] Against that and favouring an award of costs, is the conduct of Fish and Game in belatedly putting forward some modelling – the "synthetic" model – of river flows which was unable to be sustained and on which the experts had not conferred. As succinctly outlined in LCG's submissions, the impact of the "synthetic" model impacted the subsequent evidence, conferencing and hearing of the proceedings. That might possibly have swung the pendulum in favour of LCG's application for a substantial award of costs if not for the next two factors – the lateness of LCG's application for costs and the public interest.

[32] As for the delay: the length of delay in filing (being six months) is substantial. LCG says this is due to the interlinked appeals and ongoing work following the issue of the decision. While the proceedings were heard together, the decisions were separate and costs were reserved in relation to each decision. I acknowledge that had LCG sought a costs award in relation to both proceedings it would have been neater to consider them together but LCG's lack of communication to the court or Fish and Game as to their intention is careless.

[33] We do not accept LCG's argument that Fish and Game may have been more difficult to deal with had LCG sought an extension of time for filing once final decision had been issued. As counsel notes risk of cost is inherent in any litigation, by indicating its

31 Memorandum of counsel for LCG dated 5 June 2020 [5].
32 Section 285(5)(a)(i) RMA.

intention Fish and Game could have factored a potential costs award in, rather than six months passing before being sprung with an application seeking an award against it. The court seeks to deal with costs expeditiously as "there must be an end to litigation"[33].

[34] We consider there is some prejudice to Fish and Game. While it would have been well aware of the risk of costs in relation to litigation, the significant delay means the risk in relation to the PC5A proceedings was fairly considered to be slight (if not non-existent) and financial planning was undertaken accordingly.

[35] Stepping back and looking at the bigger picture: these are two sets of proceedings about a river which has been over-allocated for many years. There was considerable public benefit in having the issues ventilated fully, especially given the expectations or 'legacy' heuristic generated by the Council's original decision as to the appropriate minimum flow. A rational basis for setting water allocations for the next 35-40 years would compare the effects of LCG's proposal with the "Natural Flow". However we were obliged to compare the effect of LCG's proposed limits with the status quo. That the status quo is poor ecologically largely as a result of over-allocation and over-taking by farmers under their existing permits. They have managed to obtain considerably more water than they would have if the river had still possessed its full indigenous biodiversity. In the circumstances we consider that no order for costs should be made.

[36] Overall, we do not consider an award to be just in all of the circumstances given the complexities of this case we have discussed. We decline to exercise our discretion to award costs. Costs should therefore lie where they fall.

For the court:

J R Jackson

Environment Judge

33 *The Bridge Street/Coutts Street Subcommittee v Wellington International Airport* W16/01.