BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 139

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to section 120 of the Act
BETWEEN	FLAX TRUST
	(ENV-2016-CHC-004)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent
AND	of an application for enforcement orders pursuant to section 314 of the Act
BETWEEN	FPM VAN BRANDENBURG
	(ENV-2016-CHC-024)
	Applicant
AND	SPEARGRASS HOLDINGS LIMITED
	Respondent

Court:	Environment Judge J R Jackson (Sitting alone under section 279(1)(c) of the Act)
Hearing:	In Chambers at Christchurch
Date of Decision:	28 August 2020
Date of Issue:	28 August 2020

COSTS DECISION

A: Under section 285 of the Resource Management Act 1991, the Environment Court orders that Speargrass Holdings Limited pays the sum of $28,200 to the Flax Trust.

B: Enforcement of Order A is suspended until the High Court gives its decision on appeal.

C: Under section 286 of the Act this court names the District Court at Queenstown as the court this order may be filed in for enforcement purposes (if necessary).

REASONS

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Introduction

[1] This decision concerns applications for costs under section 285 Resource Management Act 1991 ("the RMA" or "the Act") in relation to two interlinked proceedings. First, an appeal (ENV-2016-CHC-004) by the Flax Trust against a decision of the Queenstown Lakes District Council ("the Council") declining to retrospectively vary the height, volume and footprint of an earth mound ("the mound") in Birchwood Road in the Wakatipu Basin near Queenstown. That proceeding has resulted in a number of hearings and decisions. Second, an application (ENV-2016-CHC-024) for enforcement orders by Mr FPM van Brandenburg (a trustee of the Flax Trust) against Speargrass Holdings Limited ("SHL") which is also a section 274 party to the appeal proceeding.

[2] Flax Trust has applied for costs against SHL and the Council in relation to the appeal proceedings and Mr van Brandenburg has applied for costs against SHL in the enforcement proceedings. These matters have a somewhat complicated history which I set out below in summary form.

Background

[3] Flax Trust is the owner of a property at Birchwood Road in the Wakatipu Basin. The neighbours to the north of the Flax site are Mr and Mrs Meehan whose company SHL owns 86 and 88 Speargrass Road. Flax Trust constructed a mound on the northern boundary of the Flax site against SHL's boundary. The mound was constructed to 5.17 metres high, some 2 metres higher than the earthworks consent originally granted by the Council. Flax Trust retrospectively applied to the Council to vary its consent which was opposed by SHL. The hearing commissioners declined to grant the application for variation of resource consent.

[4] In February 2016 Flax Trust appealed the Council's decision to the Environment Court. In April 2016 Mr van Brandenburg applied for enforcement orders against SHL seeking that SHL cease construction of a residence at Speargrass Flat Road and remove the roof structure.

[5] The court released its first decision[1] on 17 October 2016 ("the *2016 Decision*") allowing Flax Trust's appeal to vary its consent. That was appealed to the High Court by SHL. The enforcement proceeding was withdrawn following the release of the *2016 Decision* and an application for costs in relation to both matters was filed[2].

[6] In its decision dated 9 May 2018, the High Court held[3] the Environment Court erred in its decision and remitted it back to be reheard. After a considerable amount of new evidence and further hearing time this court again found largely for the Flax Trust, granting retrospective consent subject to conditions[4] ("the *2020 Decision*"). SHL has now appealed the *2020 Decision* to the High Court.

[7] Flax Trust filed a further application for costs against SHL and the Council in relation to costs incurred after the case was remitted back from the High Court. SHL opposed the release of a final decision and costs decision while the matter was before the High Court. Given my impending retirement and as it would allow Flax Trust to move

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1 [2016] NZEnvC 202.

2 Memorandum of counsel for Flax Trust and FPM van Brandenburg: notice of discontinuance and application for costs dated 11 November 2016 ('Flax Trust's 2016 application').

3 [2018] NZHC 1009.

4 [2020] NZEnvC 84.

forward with its subdivision development, a final decision[5] was issued. In relation to costs, I advised[6] parties I would consider the applications but consider making an order suspending its enforcement until avenues of appeal have been exhausted, if I found an award for costs was justified.

[8] Reflecting that background this decision considers the following documents:

(a) application for costs on behalf of Flax Trust and FPM van Brandenburg dated 11 November 2016;
(b) application for costs on behalf of Flax Trust received 9 July 2020;
(c) updated invoices for Flax Trust received 31 July 2020;
(d) costs submissions in reply for the Council dated 5 August 2020;
(e) memorandum on behalf of SHL regarding costs dated 5 August 2020; and
(f) final reply for Flax Trust dated 14 August 2020.

The applications for costs and the replies

[9] In relation to both proceedings, the following costs awards are sought:

(a) the 2016 application seeks that the Council and SHL together pay Flax Trust's total legal fees from the appeal proceeding being $58,459.57[7];
(b) the 2020 application seeks full indemnity costs against the Council and SHL jointly and severally being $84,606.13[8]; and
(c) Mr van Brandenburg seeks a costs award from SHL of $10,581.76 being 100% of legal fees incurred in the enforcement proceeding[9].

Submissions in relation to the Council

[10] Mr Page referred to a number of authorities supporting the proposition that a local authority should contribute to costs where the Council's conduct has "unnecessarily and unreasonably wasted the appellant's time and money"[10].

5 [2020] NZEnvC 115.
6 Minute dated 29 July 2020 [6].
7 Flax Trust's 2016 application [28].
8 This total was updated after further work was undertaken by Flax Trust in the course of confirming the final decision.
9 Flax Trust's 2016 application [28].
10 Flax Trust's 2016 application [8].

[11] Flax Trust says an award against the Council is justified on the grounds that it failed to:

(a) act even-handedly and competently concerning the various consent applications of SHL and Flax Trust;
(b) identify and assess the correct "environment"[11];
(c) keep records and gather information necessary to carry out functions as a consent authority;
(d) enforce conditions of RM160361; and
(e) offer relevant evidence on how the appeal could be resolved.

Failure to act even-handedly and competently

[12] First, it is submitted that the Council failed to act even-handedly in relation to the Flax Trust and SHL properties. Mr Page submits[12] that the Council has behaved as an advocate for SHL, referencing various examples through the resource consent application process where as a result Mr van Brandenburg has felt undermined "by the very body charged with the consistent administration of the Act".

[13] Flax Trust also says the Council acted incompetently: first by failing to completely administer its statutory functions properly in relation to the sequence of applications on the SHL property; and second the failure to competently assess the Flax Trust application, both in the first instance decision on the application for variation (which made Flax Trust's appeal necessary); and in the evidence presented to the Environment Court.

[14] Mr Page says that the Council did not understand what was being proposed by SHL's application for resource consent RM110186 and as a result of this error Flax Trust was not notified of the application (as the Tarquets were). If it had been, Mr van Brandenburg would have had the opportunity to submit on the application, reconsider Flax Trust's own subdivision design if the consent was granted and would not have been taken by surprise when construction began[13].

11 Under section 104(1)(a) RMA.
12 Flax Trust's 2016 application [11] and [12].
13 Flax Trust's 2016 application [14].

[15] Ms Balme, on behalf of the Council, says[14] that a costs decision is not the appropriate place to determine whether or not the Council's decisions on notification of the SHL consent were valid, with every application being considered on its merits at the time.

[16] The Council submits that much has been made of the sequence of SHL's consents but this issue was only identified midway through the 2016 hearing and the Council should not be penalised for issues that only became apparent during the course of the hearing and were not identified by any party in advance of the proceeding. The Council says its approach to the parties has been fair and consistent.

Assessment of the correct "environment"

[17] Flax Trust says that in the Council's original decision, the Council's reporting officers and hearing commissioners failed to identify and assess the correct environment under section 104(1)(a). Mr Page submits[15] that as this court observed[16] "everybody (save for [SHL], and their planning advisor, who said nothing) was under a misapprehension about the consents that were in fact in existence at the time that the 2012 subdivision consent and the 2013 earthworks consents were assessed and granted."

[18] In reply Ms Balme says[17] the High Court found the Council's assessment of the environment to be correct and it was remitted back to this court for reconsideration on that basis. I am not sure what Ms Balme means by that. The High Court has no fact-finding function in appeals under the RMA so I consider that assertion no further. Counsel's other points are correct: that this was an application for retrospective consent to authorise unlawful behaviour; and a theme of the court's judgment is that there are no absolute winners in this case.

Failure of duty as consent authority

[19] Mr Page submits[18] there was a "complete systematic failure" by the Council when

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14 Costs submissions for the Council dated 5 August 2020 [37] and [38].
15 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [8].
16 *2020 Decision* [111]-[114].
17 Costs submissions for the Council dated 5 August 2020 [9]-[12].
18 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [9].

considering its duty to keep records and gather the necessary information to carry out its functions as a consent authority, particularly in the preparation of a section 42A report. The Council says[19], however, that at all times it had a complete record of the resource consents granted to both Flax Trust and SHL which the Council proactively discloses to the public online. If Flax Trust is referring to the unregistered amendments to consent notices, counsel submits that this has been dealt with through the High Court appeal. Ms Balme notes that is not the duty of the Council to update the Land Transfer System; a "genesis" of this proceeding was Mr van Brandenburg looking to the Land Transfer Act's system for consenting information rather than the Council's online system. Accordingly it is submitted[20] there has been no systematic failure on the part of the Council.

[20] In reply Flax Trust agrees that the Council has complied with its duty to maintain records but the main issue is that the reporting officer failed to identify that the building platform and landscaping consent notice registered on SHL's title had been overtaken by subsequent decisions made by the Council (without notice to Flax Trust). Flax Trust says while it could have conducted diligent searches of the Council's online system, the sequence of events in 2012 with the granting of consents to both parties meant that when Flax Trust presented its case on RM120327 (the subdivision consent), only SHL and the Council were in a position to know the "environment" would change between the hearing and the issue of the decision[21].

Enforcement of conditions

[21] Mr Page says the Council's complete failure to enforce the conditions of resource consent RM160361 is a legitimate ground to sustain an award of costs at an indemnity scale. The Council says it is unaware of any outstanding enforcement issues in relation to RM160361[22] and it is the obligation of the consent holder to comply with the conditions of consent, to the extent they are not complied with the consent authority has a discretion whether to take enforcement action. In the case of both the Flax Trust and SHL, the Council opted to discuss the issues with the landowners in line with Council policy, to enable them to achieve compliance themselves before taking formal action.

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19 Costs submissions for the Council dated 5 August 2020 [14].
20 Costs submissions for the Council dated 5 August 2020 [17].
21 Submissions in reply for Flax Trust dated 13 August 2020 [8]-[11].
22 Costs submissions for the Council dated 5 August 2020 [18].

[22] Ms Balme explains[23] that the treatment of both parties has been consistent, the only difference being that SHL was able to obtain consent while Flax Trust initially did not. Counsel submits that if Flax Trust was concerned with the Council's process it should have raised that when the decisions were made, not in this application for costs and lack of enforcement action is not grounds for indemnity costs. In response[24] counsel says rather dramatically "if the Council cannot see a compliance issue with the topping of Alders and the misplacement of Deodars then Flax despairs".

Expert evidence

[23] Mr Page submits that the Council failed to offer the court any useful or relevant evidence on how the appeal could be resolved and that this should have been a case that could have been settled at an early stage. Flax Trust submits that the Council persisted with a position when its own evidence did not support that outcome[25]. The need for reconsideration from the Council became more acute once it had notified decisions on Stage 2 of its proposed District Plan. Mr Page says that Mr Woodford (as well as Mr Edmonds for SHL) failed to acknowledge and analyse the new values of the Hawthorn Triangle Character Unit 9 set out in Schedule 24.8. While the Council (and SHL) claim that they had confidence in their experts, that confidence was misplaced and Flax Trust is entitled to be compensated for the consequences of that error.

[24] Ms Balme notes that Flax Trust produced no expert evidence of its own when that was (in her submission) clearly required. Ms Balme says the Council's witnesses concluded that the consent as sought was not appropriate; that position is consistent with the court's ultimate finding and further, the changes made to the final mound design are a direct result of the issues identified in their evidence. Counsel submits[26] that it did offer relevant evidence for resolution: Ms Pflüger offered a compromise, while Mr Page himself noted that the Council's discussions with Flax Trust were constructive and useful. In response, Mr Page submits that this case was all about the relevant facts, and the legal significance of them. While it is agreed some of the Council's evidence was helpful, this was "never a contest between competing expert opinions about the aesthetic merits of

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23 Costs submissions for the Council dated 5 August 2020 [20]-[23].

24 Submissions in reply for Flax Trust dated 13 August 2020 [15].

25 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [21], referencing the *2020 Decision* [470].

26 Costs submissions for the Council dated 5 August 2020 [29]-[31].

the mound"[27]. Flax Trust's salient point is that the evidence of Mr Rowley and Ms Pflüger should have caused the Council to consider whether it should actively oppose Flax Trust's appeal, rather than abide by the court's decision[28].

[25] In conclusion, the Council submits that an award of indemnity costs would be more than excessive in this case and that none of the *Bielby* factors are present. Ms Balme notes Mr van Brandenburg's unlawful behaviour is conspicuously absent from Flax Trust's submissions and that "standing back, it is clear that no party has covered themselves in glory" so costs should lie where they fall.

Submissions in relation to SHL in the appeal proceedings

Flax Trust's application

[26] Flax Trust seeks a costs award against SHL on the following grounds:

(a) SHL has neither complied with the words nor the spirit of its own resource consents (as found by the court), showing disregard not only for Flax Trust's interests but also the law. SHL's trimming of trees demonstrates that the mound is still required, and that Flax Trust could not rely on the conditions of RM160361 to protect its legitimate expectation of privacy;
(b) the tactics employed by SHL mean it is not surprising that Flax Trust found itself with inadequate privacy once the earthworks authorised by the 2013 consent were completed. It is alleged[29] that the 22 deodars not appearing on the initial RM160361 landscape plans were not an honest mistake but "an exercise in skullduggery";
(c) SHL's witnesses Mr Edmonds and Mr Skelton failed to provide accurate or relevant evidence to the Environment Court and neither complied with the Code of Conduct[30];
(d) counsel was critical of Mr Edmonds' role in the resource consent proceedings saying that structuring the consent process to avoid engagement with neighbours resulted in the complete breakdown of trust and confidence between the parties and SHL must take responsibility for

27 Submissions in reply for Flax Trust dated 13 August 2020 [17].
28 Submissions in reply for Flax Trust dated 13 August 2020 [18] and [19].
29 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [12].
30 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [16] and [17].

that[31];

(e) SHL failed to offer the court any useful or relevant evidence on how the appeal could be resolved: when Ms Pflüger offered a potential compromise, this was reliant on SHL complying with its resource consents, which was undone (again) after her evidence was served; and Flax Trust's potential resolution (lowering the mound to 4 metres) was opposed by SHL as its witnesses had not had the opportunity to evaluate it.

[27] Flax Trust submits that the court's modification of the mound does not compromise its "clean win" for two reasons[32]:

(a) the court's direction is less onerous on Flax Trust and less beneficial to SHL than lowering the mound to 4 metres as offered in open court; and

(b) the redesign was a more nuanced response to findings of fact and law than Flax Trust's proposal, all of which favoured Flax Trust.

[28] In summary[33] Mr Page notes that the grounds set out in Mr van Brandenburg's notice of appeal have won the day. It is submitted that Mr van Brandenburg's approach to the appeal in keeping costs down means a larger proportion of legal fees should be recoverable. Mr Page also notes the countless hours of preparation that Mr van Brandenburg put into this appeal at significant cost to himself personally and professionally.

SHL's reply

[29] In reply, SHL submits[34] that costs should lie where they fall as that is just in all of the circumstances. SHL cannot be blamed for any failure of the Council and or the courts.

[30] Ms Rose, on behalf of SHL, submits that Flax Trust is wrong to suggest that the court can simply ignore SHL's success in overturning the *2016 Decision*. Against the backdrop of the High Court proceedings, SHL submits[35] that it is difficult to see how SHL gets "no credit" for its complete win in the *2016 Decision* but Flax Trust gets "full credit"

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31 Flax Trust's 2016 application [24].

32 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [25].

33 Memorandum of counsel for Flax Trust as to costs received 9 July 2020 [28] and [29].

34 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [4] and [5].

35 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [21].

for a less than complete win in the *2020 Decision*. Weighing the parties' positions in both 2016 and 2020, counsel submits that the most appropriate position is for all costs to lie where they fall. SHL suggests[36] that, should the court consider that a "line-by-line analysis of costs in both 2016 and 2020 is more appropriate" that the proper course would then be to give SHL full credit (as an offset or set off) for its reasonable legal and expert costs incurred in 2016 on a clean win basis.

[31] SHL says that Flax Trust's submissions have a clear theme that the position everyone now finds themselves in is somehow everyone's fault except its own, ignoring that:[37]

(a) this case is in large part Mr van Brandenburg's own doing when he illegally dumped fill on the Flax Trust site, illegally created the mound while the Meehans were overseas and refused to accept the Council's decision on retrospective consent;
(b) Flax Trust can see the SHL property, so if there were any concerns about the construction on the SHL property the proper course of action was for them to make enquiries with the Council and obtain the appropriate information;
(c) in the High Court Dunningham J held that the 5.17 metre mound did not have an acceptable range of effects and the possibility of it being approved was remote;
(d) the High Court decision included a warning that should have discouraged Flax Trust from pursuing an amendment to the height of the mound, despite that they pursued it in the same form;
(e) Mr van Brandenburg has accepted that the mound does not look good; and
(f) if the Council had pursued enforcement action against Flax Trust following the illegal construction of the mound, it is unlikely the parties would be where they are today.

[32] Ms Rose further submits[38] that the "fact" that this court chose to prefer some of its own views, rather than those of the experts is not a matter which can ever justify indemnity costs. Indemnity costs remain exceptional and are reserved for the rarest of

36 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [24].
37 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [7].
38 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [9].

cases, of which this is not.

[33] Counsel submits[39] that Flax Trust's complaints of perceived settlement/resolution failures are also misconceived, as are suggestions this case is a "clean win" for Flax Trust. Ms Rose says it was Flax Trust that failed to engage with SHL, and that the proposal to lower the mound to four metres lacked detail, was made well into the 2020 hearing and fell well short of the guidance given by Dunningham J.

[34] SHL submits that to the extent that Flax Trust seeks to rely on without prejudice discussions or other communication in support of its position, the court should disregard both the fact of and the content of those communications. The court should not give any credit for alleged proposals that never made it to a Calderbank offer or other formal form.

[35] If an award of costs is found to be warranted, Ms Rose submits that the starting point ought to be 25% – an amount within the court's comfort zone. She further submits[40] that the court should disregard all alleged values put on Mr van Brandenburg's time and "savings" by not calling expert witnesses as this is not an actual cost or expense incurred as considered by section 285 RMA.

[36] In conclusion, SHL submits that no jurisdiction for an award of indemnity costs exists here and quite clearly no *Bielby* factors are present. Further, Flax Trust fails to acknowledge its involvement in the cause of this litigation. SHL accordingly seeks that costs lie where they fall.

Final reply for Flax Trust

[37] Flax Trust submits[41] that SHL's argument that the court should give it credit for its "win" in the High Court is misconceived as the Environment Court exercises a merits-based jurisdiction while the High Court is limited to correcting errors of law. All SHL achieved was persuading the High Court that errors of law infected the *2016 Decision* but whether those errors, once corrected, ought to lead to a different outcome on the merits is an entirely separate matter.

39 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [10]-[15].
40 Memorandum on behalf of SHL regarding costs dated 5 August 2020 [25].
41 Submissions in reply for Flax Trust dated 13 August 2020 [2]-[5].

[38] Responding to SHL's counterfactual, where Flax Trust understands SHL to be saying that Flax Trust should have completed the mound in accordance with the earthworks consents and then applied to raise it again, counsel submits that for the counterfactual to be useful it must be assumed that had Flax Trust pursued that course then all of this litigation might have been avoided. Counsel says this is improbable.

Submissions in relation to SHL in the enforcement proceedings

[39] Finally, an award is sought in relation to the enforcement proceeding. Counsel submits[42] that SHL alone should carry responsibility for the enforcement proceeding costs for the simple reasons that the grounds for relief were made out, then "regularised" subsequently by RM160361 which was filed after the enforcement proceedings and in "dubious circumstances".

The Law

[40] Under section 285 of the Act 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.

[41] Two fundamental principles that have developed through case law are that: firstly there is no general rule that costs should follow the event (even if a party is successful); and second, costs are not to be awarded as a penalty but in the interests of compensation "where that is just"[43].

[42] Awards of costs in the Environment Court have usually been identified as falling within three bands[44]:

(a) standard costs [usually between 25% and 33% of reasonable costs sought];
(b) higher than standard costs where *Bielby* factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

42 Flax Trust's 2016 application [26].
43 *Foodstuffs (Otago Southland) Properties Limited v Dunedin City Council* 2 ELRNZ 138.
44 *Bunnings Limited v Hastings District Council* [2012] NZEnvC 4 at [35].

[43] Costs are not usually awarded against a primary decision-maker unless it has neglected its duty, acted unreasonably, or where it is clear that the Council's decision was vexatious or frivolous[45].

[44] The *Bielby* factors have frequently been referred to by the court when determining an application for higher than standard 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*[46], where the High Court set out a number of circumstances where higher costs could be awarded[47]:

(a) where arguments are advanced 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 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.

[45] Flax Trust seeks full indemnity costs from SHL and the Council jointly and severally in relation to legal costs incurred in both the 2016 and 2020 hearings. Mr van Brandenburg also seeks that SHL pay 100% of legal costs incurred in relation to the enforcement order proceeding.

Consideration

[46] I first must consider whether an award is justified bearing in mind that costs are not usually awarded against a local authority unless it has neglected its duty or acted unreasonably. I consider the three applications in turn.

<u>The enforcement proceedings</u>

[47] I consider an award of costs for this proceeding is inappropriate. While I can see

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45 Environment Court Practice Note 2014 at 6.6(c); *Darroch v Northland Regional Council* (1993) 2 NZRMA 637; *Ballantyne v Papakura District Council* A054/08.

46 *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.

47 These factors have effectively been codified in the Environment Court Practice Note 2014 in clause 6.6(d).

why Mr van Brandenburg is concerned that the Council twice allowed Mr and Mrs Meehan's house to be moved towards the Flax site, as Ms Balme points out I cannot really consider the rights and wrongs of this since there was no challenge to the non-notification decision and the Council was not a party to this proceeding. Such challenges can only be made in the High Court and none was. The Council's decision may look dubious to the Flax Trust but that is not enough. There is insufficient material justifying an order. Consequently costs in relation to ENV-2016-CHC-024 should lie where they fall.

The *2016 Decision*

[48] The application for resource consent by Flax Trust was retrospective. Even if the Council and the section 274 party SHL did act inappropriately (and at this stage I make no finding about that) the fact that the Flax Trust built first and applied for resource consent later is such a large factor against it that I consider an award of costs for the work up to the *2016 Decision* is inappropriate.

The *2020 Decision*

[49] In relation to this, the issues are more complex. I consider first the application for costs against the Council and then against SHL.

Should the Council pay costs for the 2020 hearing?

[50] I consider the Council has neglected its duty, although not to the degree alleged by Flax Trust. The lack of systematic collegiality and the engagement of outside experts in dealing with the resource consents in 2012[48], and later for both Flax Trust and SHL, meant that the wrong "environment" was considered by the hearing commissioners when considering both the Flax Trust subdivision consent and the earthworks consents. Further, the failure to enforce or at least to recognise the need to enforce conditions in relation to the Meehans' topping of screening trees has exacerbated the fundamental issue of privacy.

[51] However, I do not agree with Mr Page that all the Council's experts failed to provide useful evidence. Both Mr Rowley and Ms Pflüger's evidence – especially the

48 As set out at [19] of the *2020 Decision*.

latter's answers to the court – were of assistance to the court. I do accept that the failure of the Council's planner Mr Woodford to acknowledge and analyse the new values of the Hawthorn Triangle Character Unit 9 in its own proposed District Plan was significant.

[52] I doubt if this is of much relevance to the issue of costs but I must observe that Ms Balme was quite wrong to say that the Flax Trust should have called expert evidence. Any party is quite entitled (if it wishes) to accept or be bound by the evidence of another party if it wishes to take the risk of doing that, and if the evidence is shown to be based on the correct objectives and policies in the relevant statutory instruments. It is not only the court which is entitled to expect evidence from experts to be independent and objective but other parties than those calling the expert also. In this case Mr Rowley and Ms Pflüger came across as independent and objective witnesses even if unfortunately, the latter was not asked to assess the application under all the relevant criteria in the PDP. Mr Page is closer to the mark on this issue when he says that the Flax Trust should be given credit for running an efficient case. That is correct: for a rehearing of nearly one week the costs sought are modest.

[53] It is a fine line but taking into account all the matters raised, I consider a costs award against the Council is not appropriate (but it is perhaps fortunate in that outcome).

Should SHL pay costs for the 2020 hearing?

[54] Ms Rose referred to an acknowledgement by Mr van Brandenburg that the mound "does not look good". That is not relevant to costs, just as the opinion that the mound has undesirable effects on the visual amenity of the Flax Trust site was irrelevant as I stated in the *2020 Decision*. How the mound is (and will be in the future) reasonably perceived from the SHL site was the subject of extensive discussion, findings and predictions in the decision.

[55] I accept that the description of the 'environment' considered by the hearing commissioners on the various Flax Trust applications only really arose during the 2016 hearing. However, the parties had ample time to consider it between then and the 2020 hearing.

[56] Counsel for the Council and SHL submit (if I understand them correctly) that the High Court decision established what the correct environment to be considered was and that the *2020 Decision* ignored that. That seems to be a submission more properly to be

made on the second appeal to the High Court.

[57] For the purposes of this decision I merely repeat the gist of the *2020 Decision*: that the Environment Court accepts that it is for the High Court to say what the correct approach to establishing the current and reasonably foreseeable future environment under section 104(1)(a) RMA is, and this court was bound by any such rulings and, to the extent they were relevant, the findings of fact by the High Court in the Property Law Act proceedings in that Court.

[58] But what this court did was to establish what environment was assessed by the Council's experts and its hearing commissioners when assessing and deciding the Flax Trust's applications as a matter of fact.

[59] The court also acknowledged[49] that technically both the subdivision consent and the earthworks decision might be deemed to have considered the amended SHL plans. Both factors were relevant to granting consent under the ODP and considered by the court. The fact that SHL relied almost exclusively on the latter is also relevant to a costs order, as is the fact that Mr van Brandenburg should have been mistrustful of his neighbours – despite their written advice to him about their desire for privacy – and searched the Council's records. Although precisely when such a search would have assisted him is open to debate. Mr Page submitted:

> When Flax presented its case in favour of RM120327 on 17 October 2012, it could not have known even if it had searched [the Council's database] Edocs, that the *Hawthorn* "environment" would change between the hearing and the issue of the decision. Only Speargrass and the Council were in a position to know that. And they didn't tell anyone.

[60] In summary the SHL case was put forward as if the approved mound dealt with all the effects on privacy for the Flax Trust site created by the existence of the Meehans' house. SHL also relied on the first instance (Council) decisions to support that position. Consequently an important point was that the approved mound was as a matter of fact neither designed by the Flax Trust to be, nor considered by the Council's experts and hearing commissioners as being a response to the Meehans' house with its current dimensions and actual location close to the joint boundary. The constant reference back to the approved mound height was at best a technical point in relation to the criteria under

49 [2020] NZEnvC 84 [111].

the ODP and irrelevant to assessment under the PDP.

[61] SHL (and the Council) signally failed to understand (with the honourable exception of the Council's witness Ms Pflüger) the environment assessed by the Council's witnesses and hearing commissioners and its implications for the hearing earlier this year as the court explained (at length) in the *2020 Decision*.

[62] The court's findings in the *2020 Decision* about the purpose of the SHL screening condition are important. I accept Mr Page's submission that SHL has failed to comply with the words and spirit of its resource consents with its topping of alders alongside the failure to plant the deodars in the correct places. Reliance on views which could only be obtained by what appears to be a breach of the fundamental terms of the SHL consent caused unnecessary expense to the Flax Trust.

[63] As for SHL's expert evidence, as noted in the *2020 Decision* I was unconvinced of Mr Skelton's independence and objectivity. I am not persuaded by counsels' submissions as to "credit" and whether each decision could be considered a "win". A costs award is made on the basis of compensation where it is just and the outcome is only one (albeit an important one) factor to be considered.

[64] As for Ms Rose's rather provocative submission that the court chose to prefer its own views that is, at best, a caricature of the *2020 Decision*. The court found that none of the experts fully considered the relevant provisions for the Hawthorn Triangle in Schedule 24.8 of the "Proposed District Plan" and the SHL's experts failed to do so quite significantly. Further, SHL's experts lacked objectivity and independence: effectively they came across as advocates for Mr and Mrs Meehan.

[65] The court did not simply substitute its own views, but used evidence and opinions of the Council's experts mainly (and some factual consistent evidence from Mr van Brandenburg and SHL's experts) in order to make findings and predictions on the matters which the court found that the experts should have considered (but did not).

[66] I do not take into account in relation to costs the offer by the Flax Trust to lower the mound by 1 metre. That was made too late to be relied on as a relevant factor. Nor do I take into account Mr van Brandenburg's own time and effort. Much of his preparation for the 2020 hearing appears to have been analysis of why he disagrees with the High Court findings. That was both unnecessary and unwise, although I can understand his

sense of grievance since it appears (I put it no stronger than that) that the High Court in its decision on the Property Law Act proceeding failed to consider any potential hardship to the Flax Trust while making much of the hardship to Mr and Mrs Meehan.

[67] One factor I should consider is that the mound cannot be retained at its height as at the hearing. There has been some small success for SHL in the orders made by the court, although in practical terms if SHL was to abide by the terms of its resource consents, I doubt if the mound up to its full 5.17 metres would be meaningfully seen when the deodars reach maturity. Further, over four days of "rehearing" should not have been necessary to reach such a result, and most of the unnecessary time was caused by the SHL case.

[68] While I considered above that costs should lie where they fall for the 2016 hearing, a similar approach does not seem fair and just for the rehearing. I consider an award of some costs against SHL is appropriate for the 2020 hearing, not as a punishment but simply to compensate the Flax Trust for unnecessary expense.

What is the appropriate amount?

[69] I now turn to quantum. The invoices for legal costs rendered to the Flax Trust for the 2020 hearing and for obtaining the final orders total $84,606.13. Flax Trust seeks full indemnity costs. I am not convinced the actions of SHL warrant an award for indemnity costs given the context, and in particular Mr van Brandenburg's precipitate reaction in increasing the height of the mound after seeing the construction of the Meehan residence in its current location is a strong factor against awarding such costs.

[70] I consider that the outcome of the case (some modification of the mound) and the retrospective nature of the Flax Trust application entail that indemnity costs are not appropriate. However, the unprofessional evidence of SHL's experts lengthened the hearing considerably as did some incorrectly focused cross-examination. I consider that the Flax Trust should be given some compensation for those costs. In the circumstances I consider an award of about 33% of costs is the correct figure.

Result

[71] Accordingly I will make an order that SHL pays costs of $28,200 to the Flax Trust.

[72] The final question is whether that order should be stayed, pending resolution of the appeal to the High Court. I think it should be, since SHL has made an extensive appeal. At least I, as the hearing judge and the sole arbiter of facts and predictions in this proceeding, have been able to fix the costs in a fair way so that none of my colleagues in this court have to consider the matter in this unfortunate affair which has already taken up more court time than is justifiable on a reasonable and proportionate assessment.

J R Jackson
Environment Judge