IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 116

IN THE MATTER OF	of three appeals under s 120 of the Resource Management Act 1991 and an application for declarations under s 310 of the Act
BETWEEN	TE RŪNANGA O NGĀTI AWA (ENV-2018-AKL-000133)
	NGĀTI TŪWHARETOA (BOP) SETTLEMENT TRUST (ENV-2018-AKL-000134)
	SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000135)
	Appellants
AND	SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000166)
	Applicant for declarations
AND	BAY OF PLENTY REGIONAL COUNCIL
	WHAKATĀNE DISTRICT COUNCIL
	Respondents
AND	CRESWELL NZ LIMITED
	Applicant for consents
AND	TE RŪNANGA O NGĀI TE RANGI IWI TRUST
	NGĀTI PIKIAO ENVIRONMENTAL SOCIETY
	TUWHAKAIRIORA O'BRIEN and NGĀI TAMAWERA HAPŪ
	KIWIRAIL LIMITED
	RIHI VERCOE
	s274 Parties

Court:	Chief Environment Court Judge D A Kirkpatrick sitting alone under s 279(1)(g) of the Act
Hearing:	On the papers
Last case event:	Costs application by Creswell NZ Limited dated 5 February 2021 Submissions in opposition to costs by Te Rūnanga o Ngāti Awa, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Ngāti Pikiao Environmental Society dated 15 March 2021 Submissions in opposition to costs by Sustainable Otakiri Incorporated dated 15 March 2021 Submissions in reply by Creswell NZ Limited dated 22 March 2021
Submissions:	D Randal and E Bennett for Creswell NZ Limited J Gardner-Hopkins for Sustainable Otakiri Incorporated H Irwin-Easthope and K Tarawhiti for Te Rūnanga o Ngāti Awa, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Ngāti Pikiao Environmental Society
Date of Decision:	6 August 2021
Date of Issue:	6 August 2021

DECISION OF THE ENVIRONMENT COURT

A: **The application for costs is granted.**

B: **Creswell is awarded costs against Sustainable Otakiri in the sum of $60,000. This amount includes the $13,500 held by the Court as the security for costs given by Sustainable Otakiri.**

C: **Creswell is awarded costs against TRONA, Ngāti Pikiao and Ngāi Te Rangi in the sum of $30,000.**

D: **The execution of this decision is stayed pending the determination of the appeals from the decision of the High Court to the Court of Appeal or further order of this Court.**

REASONS

The applications for consent

[1] Creswell NZ Limited (**Creswell**) applied to the Bay of Plenty Regional Council (the **Regional Council**) and Whakatāne District Council (the **District Council**) for various consents to enable the expansion of an existing water extraction and bottling operation currently operating at 57 Johnson Road, Otakiri.

[2] The applications to the Regional Council were to take groundwater for the water bottling operation,[1] undertake earthworks,[2] discharge stormwater and treated process wastewater,[3] and discharge treated sanitary wastewater to land.[4]

[3] The application to the District Council was to vary the conditions applying to an existing land use consent[5] to allow the expansion of the water bottling plant. New land use consents were also sought for earthworks adjacent to the Tarawera River stopbank and for soil disturbance on an identified contaminated site.

The Councils' decisions and the appeals

[4] The applications were heard and considered jointly in the first instance by a panel of two independent Commissioners on behalf of both the District and Regional Councils who delivered their decision on 11 June 2018.

[5] The Commissioners granted the applications for consent to take groundwater and other associated consents and the applications for the changes to consent conditions for the existing land use consent and for the new land use consents.

[6] Te Rūnanga o Ngāti Awa (**TRONA**) appealed the regional consents. Sustainable Otakiri Incorporated (**Sustainable Otakiri**) appealed both the district and regional consents and filed an application for declarations from the Court in relation to jurisdictional matters. Sustainable Otakiri subsequently withdrew their

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1 RM17-0424-WT.01
2 RM17-424- LC.01
3 RM17-0424-DC.02 and RM17-424-DC.03
4 RM17-0424-DC.01
5 Consent ref. 61/4/817

appeals against the regional consents.

[7] Te Rūnanga o Ngāi Te Rangi Iwi Trust (**Ngāi Te Rangi**) and Ngāti Pikiao Environmental Society (**Ngāti Pikiao**) supported the appeal by TRONA as s 274 parties.

The Courts' decisions

[8] A number of decisions have been made by this Court and the High Court in relation to these matters including:

(a) Decision [2018] NZEnvC 169 – Decision on the standing of parties under s 274 of the Act.

(b) Decision [2018] NZEnvC 193 – Decision on application for waiver to join the appeals under s 274.

(c) Decision [2018] NZEnvC 195 – Determination of request for Access to documents.

(d) Decision [2018] NZEnvC 207 – Decision on application for strike out and security for costs.

(e) Decision [2019] NZEnvC 196 – Interim Decision of Environment Court.

(f) Decision [2019] NZEnvC 75 – Second Decision on application for security for costs.

(g) Decision [2020] NZenvC 52 – Decision on application for stay of proceedings pending appeal.

(h) Decision [2020] NZEnvC 89 – Final Decision of Environment Court on Conditions.

(i) Decision [2020] NZHC 3388 – High Court Judgment of Gault J.

(j) Decision [2021] NZEnvC 94 – Decision on procedural matters pending further appeals.

[9] The issue of costs was reserved following the determination of the matters in the Environment Court.

Costs in the Environment Court

[10] In the Environment Court, there are no rules relating to costs, and no scale of costs. The relevant jurisdiction is to be found entirely in s 285 of the Resource Management Act 1991, which gives the Court a general and unfettered discretion to make an award of costs. The Environment Court Practice Note 2014 also sets out guidelines in relation to costs. However, it does not create an inflexible law or practice.[6]

[11] Section 285 confers a broad discretion. There is a great deal of case law as to the principles to be applied in the exercise of that discretion. Principles which are particularly relevant to this case appear to be as follows:

(a) There is no general rule in the Environment Court that costs follow the event;[7]

(b) Costs are ordered to require an unsuccessful party to contribute to the costs reasonably and properly incurred by a successful party;[8]

(c) Costs are awarded not as a penalty but as compensation where that is just;[9]

(d) An award may compensate parties for costs unnecessarily incurred as a result of proceedings which should not have been brought.[10]

[12] When considering an application for costs the Court will make two assessments.[11] The first assessment is whether it is just in the circumstances to make

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6 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289, para [21].
7 *Culpan v Vose*, Decision A064/93.
8 *Hunt v Auckland CC*, Decision A068/94.
9 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* [1996] NZRMA 385.
10 *Paihia and District Citizens Assn Inc v Northland RC* (1995) 2 ELRNZ 23.
11 See *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

an award of costs. The second assessment, having determined an award is appropriate, is deciding the quantum of costs to be awarded.

[13] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. The range of cases that come before this Court is so great and the circumstances of proceedings are so diverse that devising a fair scale would be at least very difficult and likely to have so many exceptions that it could not truly be used as a scale. Nonetheless, experience has shown that many of the Court's awards have tended to fall within four bands, as follows:

(a) No costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or cases where some aspect of the public interest counts against any award being made;

(b) Standard costs which generally fall within 25-33% of costs actually and reasonably incurred (sometimes referred to in decisions as the "comfort zone");

(c) Higher than standard costs where certain aggravating factors are present, as discussed below; and

(d) Indemnity costs, which are awarded rarely and in exceptional circumstances.

[14] The decision in *DFC NZ Limited v Bielby*[12] outlined five factors that may be taken into account when awarding higher than standard costs:

(i) Where arguments are advanced without substance.

(ii) Where the process of the Court is abused.

(iii) Where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing.

(iv) Where it becomes apparent that a party has failed to explore the

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

possibility of settlement where compromise could have been reasonably expected.

(v) Where a party takes a technical or unmeritorious point of defence.

[15] These factors are listed in the Court's practice note. They are also now codified in Rule 14.6(3) of the District Court Rules 2014 and in Rule 14.6(3) of the High Court Rules 2016.

The application for costs

[16] Creswell seeks costs against Sustainable Otakiri and costs jointly and severally against TRONA, Ngāi Te Rangi and Ngāti Pikiao.

[17] The application for costs was accompanied by an affidavit of Mr MHJ Gleissner, sworn 3 February 2021.

Costs against Sustainable Otakiri

[18] Creswell has submitted that the costs it incurred defending Sustainable Otakiri's appeal and application were $488,934. Creswell seeks an award of costs against Sustainable Otakiri of half that, being $244,467.

[19] Creswell's submission is that Sustainable Otakiri should contribute to the costs it incurred at a higher than standard level because:

(a) Its appeal advanced the private interest of its members rather than a public interest.

(b) The appeal was unnecessarily broad and advanced arguments that were without substance. This included putting Creswell to proof on numerous technical issues without adducing its own expert evidence on those matters, and pursuing numerous other unmeritorious points.

(c) Its appeal was unmeritorious and its purpose was to delay the implementation of the project.

(d) A number of points pursued by Sustainable Otakiri were overly technical and without merit, including its argument concerning the application being made under s 127, the activity status of the proposal and the notification of the proposal.

(e) It failed to explore the possibility of settlement where compromise could have been reasonably expected.

[20] Counsel for Sustainable Otakiri submitted that costs should lie where they fall. If costs are awarded it is Sustainable Otakiri's position that costs should be awarded in the comfort zone (i.e. 25% of reasonable costs).

Are costs warranted against Sustainable Otakiri?

[21] The first question for the Court to determine is whether costs are warranted against Sustainable Otakiri.

[22] Having considered the parties' submissions I do not accept Creswell's submission that the appeal by Sustainable Otakiri was completely without substance and/or merit or that its sole purpose was to delay the implementation of the project. Even so, I accept that the way in which Sustainable Otakiri conducted its case put Creswell to unnecessary cost and that an award of costs is appropriate. I do not consider this to be a case where Sustainable Otakiri should be exempt from costs because it acted in the public interest. It was clear that in pursuing this appeal the members of the group were pursuing their personal interests rather than those of the community.

[23] I find that an award of costs is warranted against Sustainable Otakiri for the following reasons:

(a) The appeal by Sustainable Otakiri was initially very broad and challenged the entire decision of both Councils. The scope of the appeal was later narrowed, but I accept the submissions on behalf of Creswell that they were required to address multiple issues including noise, visual effects and rural character and amenity effects.

(b) Creswell also adduced expert evidence in circumstances where Sustainable Otakiri did not call experts to challenge Creswell's position.[13]

(c) Sustainable Otakiri pursued technical arguments that were unsuccessful including those concerning s 127, the activity status of the proposal and the notification of the proposal.

(d) Creswell attempted to engage in a meaningful way with the local community during the development of the applications for consent, after the Councils' decision and at the hearing and in closing submissions by modifying its proposal.[14] In this context I agree with Creswell's submissions that Sustainable Otakiri could have done more to engage with Creswell and that settlement could have been reached in relation to some of the issues.

[24] For the reasons above I find that an award of costs against Sustainable Otakiri is warranted.

[25] The next question to determine is the appropriate amount of such costs order. In determining the issue of quantum I need to take into account the fact that Sustainable Otakiri was ordered to pay security for costs in the sum of $13,500,[15] and that Sustainable Otakiri has challenged the amount of costs sought on the grounds that they are unreasonable.

[26] Creswell has submitted that the costs it incurred defending Sustainable Otakiri's appeal and application were $488,934. These costs were made up of expert witness costs of $165,894 and legal fees of $323,040. Creswell seeks an award of 50% of the costs incurred, being $244,467.

[27] Sustainable Otakiri's position is that costs of $488,934 are excessive and these costs represent a "Rolls-Royce" approach adopted by Creswell rather than

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13 *Sustainable Otakiri Incorporated v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [270].
14 *Sustainable Otakiri Incorporated v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [271].
15 *Sustainable Otakiri Incorporated v Bay of Plenty Regional Council* [2019] NZEnvC 75 At [23].

representing a reasonably resourced appeal. Counsel referred to a decision of his Honour Judge Sheppard which stated:[16]

> I accept that if a party conducts its case more fully and thoroughly than was reasonable, or incurs unnecessary costs, then even if successful it cannot in general expect an order that its opponent pay more than a reasonable allowance.

[28] Sustainable Otakiri's submission is that costs for a 2.5 day hearing should be assessed at $200,000 rather than $488,934 and that the starting point for costs at the lower end of the Court's comfort zone would amount to $50,000.

[29] In addition, it seeks that a further discount of 30% be applied to reflect the public interest element and the Court's split decision. On that basis an award of $50,000 would be reduced to $35,000 and would then have $13,500 deducted to reflect the security for costs already given. The final amount to be awarded would be $21,500.

[30] Having considered the submissions of both parties I find that a higher than usual award of costs would not be warranted in this case. I also accept Sustainable Otakiri's submission that Creswell's actual costs were high. I have decided to award an amount that reflects a reasonable contribution towards Creswell's costs while taking into account that Sustainable Otakiri is a community group with limited resources and that costs awards should not be set at amounts where they create a barrier to accessing justice.

[31] On that basis I award to Creswell costs against Sustainable Otakiri in the sum of $60,000. This amount includes the $13,500 held by the Court as the security for costs given by Sustainable Otakiri.

Costs against TRONA, Ngāi Te Rangi, and Ngāti Pikiao

[32] Creswell seeks an award of costs of $152,973, against TRONA, Ngāi Te Rangi, and Ngāti Pikiao on a joint and several basis.

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16 *Geotherm Energy Limited v Waikato Regional Council* A34/94.

[33] TRONA, Ngāi Te Rangi and Ngāti Pikiao made joint and specific submissions in opposition to the application for costs against them. Their position is that costs should lie where they fall.

Are costs warranted against TRONA, Ngāi Te Rangi and Ngāti Pikiao?

[34] Creswell considers that an award of costs against TRONA is reasonable because TRONA's appeal was:

(a) unnecessarily broad and complex, in that it raised matters not supported by TRONA's own evidence;

(b) not meritorious because highly technical points were taken to bring the appeal within an RMA "frame"; and

(c) underpinned by concerns about matters of policy that were beyond the jurisdiction of the Court. The issues were political in nature and largely unrelated to Creswell's proposal.

[35] Creswell submitted that because Ngāi Te Rangi and Ngāti Pikiao joined TRONA's appeal and supported TRONA's position, they prolonged the hearing and gave rise to various other points requiring a response by Creswell.

[36] Creswell considers that other factors justifying an award of costs against Ngāi Te Rangi and Ngāti Pikiao include that:

(a) neither party adduced any evidence to support its case;

(b) both parties advanced technical and unmeritorious points.

(c) both parties based their arguments on the principles of Te Tiriti o Waitangi, but did not provide an evidentiary basis for or otherwise justify their assertions.

[37] Having considered the submissions for and against an award of costs I accept that:

(a) TRONA narrowed its appeal in advance of the hearing,[17] and withdrew parts of its appeal.

(b) TRONA's case was supported by tangata whenua and expert evidence. It also engaged a hydrological expert, Mr Anthony Kirk and engaged a planner, Ms Bridget Robson, to assist it with planning advice.

(c) TRONA's cultural evidence was appropriate, but the Court preferred the evidence of Mr Eruera called by Creswell.

(d) Ngāi Te Rangi's submissions were succinct and focused on two matters, being the planning framework and the Mataatua Declaration.

(e) Ngāti Pikiao adopted the case put forward by TRONA and its counsel was economical in cross-examination.

[38] Having weighed those matters, I find that an award of costs is appropriate against TRONA, Ngāi Te Rangi and Ngāti Pikiao because some of the main arguments advanced, such as the end use of putting water in plastic bottles and exporting the bottled water, were found by the majority of the Court to be beyond the scope of consideration of an application for resource consent to take water from an aquifer.[18] I also recognise, as submitted by Creswell, that there was an element to some of the issues pursued that could not be raised before the Court and ought to have been pursued elsewhere.

[39] In reaching this decision, I have considered the submissions of TRONA, Ngāi Te Rangi and Ngāti Pikiao that they acted in the public interest but, as with Sustainable Otakiri, I find that they were predominantly advancing their own interests rather than those of the general public. For these reasons I find that an award of costs is warranted against TRONA, Ngāi Te Rangi and Ngāti Pikiao.

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17 By joint memorandum dated 25 January 2019 and memorandum of counsel of 22 March 2019.

18 *Sustainable Otakiri Incorporated v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [66].

[40] Regarding the amount of costs sought, Creswell submitted that it incurred costs in defending TRONA's appeal, and answering the cases for Ngāi Te Rangi and Ngāti Pikiao in the sum of $458,920 made up of expert witness costs of $135,880 and legal fees of $323,040.

[41] Creswell seeks an order that TRONA, Ngāi Te Rangi, and Ngāti Pikiao pay costs equivalent to 33% of the costs it actually incurred, being $152,973.

[42] TRONA, Ngāti Pikiao and Ngāi Te Rangi's position is that Creswell elected to call a fulsome or "gold-plated" case in support of its position. They submitted that while Creswell is entitled to run its case how it wishes, it is not their responsibility to bear the brunt of that approach.

[43] Given the narrowed scope of TRONA's appeal, and of Ngāti Pikiao's and Ngāi Te Rangi's areas of focus, counsel submitted that $175,000 is a reasonable and realistic starting point for a 2.5 day hearing. Counsel submitted that a starting point of 25% of that amount, being the lower end of the "comfort zone", with a discount of 30% due to the matters of public interest raised in these proceedings, would take any potential costs award against the three parties to $30,635.

[44] Considering those issues of quantum I find that an award of higher than usual costs would not be warranted in this case. Costs should fall within the comfort zone.

[45] As with Sustainable Otakiri, I accept the submission that Creswell's actual costs were high. As a result, I have exercised my discretion to award an amount the that reflects a reasonable contribution towards Creswell's costs. In my judgment, that amount is $30,000.

Deferment of the costs awards

[46] In its decision on procedural matters pending further appeals dated 8 July 2021[19] the Court granted an order staying execution of the interim decision of this Court pending the determination of the applications for leave to appeal from the decision

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19 *Sustainable Otakiri Incorporated v Bay of Plenty Regional Council* [2021] NZEnvC 094.

of the High Court to the Court of Appeal and, if leave is granted, of any such appeal or further order of this court. Leave has now been granted by the Court of Appeal on several questions.[20] In my judgment it is therefore appropriate to stay the execution of this costs decision in the same way.

Decision

A: The application for costs is granted.

B: Creswell is awarded costs against Sustainable Otakiri in the sum of $60,000. This amount includes the $13,500 held by the Court as the security for costs given by Sustainable Otakiri.

C: Creswell is awarded costs against TRONA, Ngāti Pikiao and Ngāi Te Rangi in the sum of $30,000.

D: The execution of this decision is stayed pending the determination of the appeals from the decision of the High Court to the Court of Appeal or further order of this Court.

D A Kirkpatrick
Chief Environment Court Judge

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20 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354.