IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 134

IN THE MATTER OF	an application for enforcement orders under s 314 and s 316 of the Resource Management Act 1991 (**the Act**)
BETWEEN	DUNEDIN CITY COUNCIL
	(ENV-2019-CHC-122)
	Applicant
AND	STEVEN ROSS AND MICHAEL ROSS
	Respondent

Court:	Alternate Environment Judge L J Newhook
Hearing: Last case event:	On the papers Costs submissions received 19 January, 1 February and 10 February 2021
Submissions:	Shelley Chadwick on behalf of Dunedin City Council Phil Page and Simon Pierce on behalf of Steven and Michael Ross
Date of Decision:	7 September 2021
Date of Issue:	7 September 2021

DECISION OF THE ENVIRONMENT COURT ON COSTS

A: The application for costs is granted in part.

REASONS

Introduction

[1] On 1 August 2019 the Dunedin City Council (**Council**) applied for enforcement orders over a large undeveloped property owned by the Messrs Ross ("**the respondents"**) at 123 Mornington Road, Dunedin, Lot 1 DP 338888, Lot 1 DP 317448 and Lot 3 DP 9142.

[2] In summary the application sought that the respondents:[1]

(a) Cease vegetation clearance and not recommence without the required resource consent, on account of contravention of Rule 10.3.2.4.1 of the proposed Second-Generation Dunedin City District Plan (**2GP**); and

(b) Restore the area where vegetation has been cleared,[2] pursuant to s 314(1)(c) and s 314(4) of the Act, by constructing certain fences, retaining remaining vegetation, felling certain large exotic trees, replanting the cleared areas in a prescribed detailed manner and installing ten artificial *peripatus* habitats in certain places on the property to create artificial habitat for fauna species.

[3] The application was heard on 15 September 2020, where the respondents opposed the making of enforcement orders other than the one that required them to cease clearance works.

[4] On 18 December 2020 the Court refused the Council's application in its entirety. The issue of costs was reserved.

[5] The respondents seek indemnity costs against the Council, totalling $50,044.18. This amount represents their legal and expert witness costs. The Council opposes.

[6] In making this decision the Court has considered the respondents' application dated 19 January 2021, the costs submissions made on behalf of Council dated 1

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[1] *Dunedin City Council v Ross* [2020] NZEnvC 212, at [2].
[2] The vegetation cleared was shown in plans attached to the application.

February, and the submissions in reply from the respondents dated 10 February.

Costs in the Environment Court

[7] The Court's jurisdiction to award costs is found in s 285, 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.[3]

[8] The discretion afforded the Court under s 285 of the Act does not exclude or exempt any type of proceeding or any type of party from a costs award.

[9] In determining an application for costs the Court will make two assessments.[4] The first assessment is whether it is just in the circumstances to make an award of costs. The second assessment, having determined an award is appropriate, is deciding the quantum of costs to be awarded.

[10] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs, but awards tend to fall within three bands, as follows:

(a) standard costs which generally fall within 25-33% of costs actually incurred, or potentially less. (The 25-33% range is sometimes referred to in the Court's decisions as the "comfort zone");

(b) higher than standard costs where "*Bielby* factors" [5] are present; and

(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

[11] The decision in *DFC NZ Limited v Bielby*[6] outlined five factors that may be considered when awarding higher than standard costs:

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[3] *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289, para [21].
[4] See *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.
[5] *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.
[6] *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.

(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 possibility of settlement where compromise could have been reasonably expected.

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

Is an award of costs warranted?

[12] I find that an award of costs against the Council is warranted for the reasons set out below.

Costs are more likely to be awarded against an unsuccessful applicant for enforcement orders

[13] The respondents referred the Court to case law demonstrating that costs should be awarded because they are more likely to be awarded against unsuccessful parties in enforcement proceedings.[7]

[14] The respondents submitted that this is because parties subject to enforcement order applications have no option but to respond to them. The second reason given by the respondents was that if the orders sought by the Council had been granted they would have impinged on the respondents' property rights and created a significant burden due to the ongoing maintenance obligations sought.

[15] I agree with the respondents' submissions that costs are more likely to be

[7] *Taukei v Horowhenua District Council* [2018] NZEnvC 161 at [19]. See also *Tararua District Council v Capital All Signs Holdings Limited* [2019] NZEnvC 11 at [20]; and *Maehl v Lenihan* [2019] NZEnvC 108 at [13].

awarded against an unsuccessful applicant for an enforcement order.

[16] Where a Council brings an unsuccessful application for enforcement orders costs are more likely to be awarded in favour of the respondent, as the respondent is in a position where it must defend its position.[8] Having failed in its application it is reasonable for the Council to expect that it would then have to meet an application for costs.[9]

I note however, that the fact that the enforcement order would have impinged on the respondents' rights is not relevant in considering whether there should be an award of costs.

Was this a test case?

[17] In its submissions the Council referred the Court to *Wilkins Farming Co Limited v Southland Regional Council*[10] and *Retro Developments Limited v Auckland City Council,*[11] which set out the hallmarks of a test case. These hallmarks include where: [12]

(a) Issues raised require resolution of uncertainty;

(b) New and important questions of interpretation are raised;

(c) The outcome of the case has clarified rules in a plan; and

(d) The case is the first of its kind under a plan.

[18] The Council's position is that the application for enforcement orders carried a number of the hallmarks of a test case, because the Court was called on to consider and determine how to apply a key rule governing indigenous vegetation clearance within the various urban overlay areas across the district. There was also a genuine

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[8] *Waimakariri District Council v Addie* EnvC C203/2000, 15 December 2000, at [10]
[9] *Waimakariri District Council v Addie* EnvC C203/2000, 15 December 2000, at [9]
[10] [2020] NZEnvC 200 at [26].
[11] EnvC A156/05.
[12] EnvC A156/05 at [11].

dispute between the parties about the application of a rule in the district plan.

[19] The Council submitted that the result of the enforcement proceeding was that the Court closely analysed the operation of Rule 10.3.2.4.a in the newly operative 2GP and referred to excerpts from the Court's decision that demonstrated this.[13]

[20] The Court's interpretation regarding the exceptions to the Rule may apparently be incorporated into the Council's future assessments and consideration of activities governed by Rule 10.3.2.4.a, to enable the Council to better engage with landowners seeking to, or undertaking clearance of indigenous vegetation.

[21] In response the respondents urged the Court to find that this was not a test case,[14] and submitted that in the circumstances the Council did not need to seek enforcement orders to resolve any apparent ambiguity in a rule of its plan. They submitted that if the Council wished to resolve any apparent ambiguity in Rule 10.3.2.4 it should have sought a declaration pursuant to section 310(1)(h) RMA.

[22] I accept that submission, because use of the enforcement procedure can lead to serious consequences of prosecution. Seeking a declaration would have been a more appropriate approach. While *Retro* and *Wilkins* did involve test cases, neither were matters that involved using an enforcement order application as a test case. Neither do the decision excerpts referred to by the Council[15] act as an exoneration and justify the pursuit of a test case in an enforcement order scenario.

[23] I find that the Council officers should have recognised the unworkability of the rule and not run an enforcement proceeding as a test case.

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[13] See for example *Dunedin City Council v Ross* [2020] NZEnvC 212 [42], [47] and [50].
[14] In support of its position it referred the Court to *Tussock Rise Ltd v Queenstown Lakes District Council* [2020] NZEnvC 105 where Court had declined to define the case as a test case.
[15] See for example *Dunedin City Council v Ross* [2020] NZEnvC 212 [42], [47] and [50].

Are there Bielby factors present?

Were the arguments advanced by the Council without substance?

[24] The respondents' submission is that they had raised the issues used in their defence, prior to the proceeding commencing, and the Council chose to proceed with the enforcement orders despite this.

[25] For example, counsel for the respondents outlined the problems with Council's interpretation of the exception at Rule 10.3.2.4.b relating to fencing, noting that the topography of the site is steep and that Mr Ross was required to undertake the clearance by way of tracked digger. The Council did not call evidence to rebut the expertise of Mr Ross, despite knowing that was going to be advanced. Instead, the Council adduced evidence from Ms Helen Dempster in the form of two affidavits.[16] The Court addressed Ms Dempster's evidence in relation to the efficacy of the vegetation clearance for the purpose of fencing at [34]-[40] and concluded that:[17]

> I find these expressions of opinion unreliable in view of the concession Ms Dempster was forced to make and the comparative experience of Mr Ross operating such machinery in such terrain.
>
> While the Rule endeavours to offer a fair balance between vegetation protection and property rights, it is unfortunately unworkable in circumstances such as these as illustrated by the lengths Ms Dempster went to, to endeavour to prove a breach.

In relation to the exception in the rule pertaining to fencing, the Court found:[18]

> This exception in the rule does not restrict methods to be used for vegetation clearance to manual (or any) methods. Under cross examination Ms Dempster agreed that there was an acceptance in the plan that there may be "collateral damage to some extent, but not necessarily clear felling". In the absence of limitations in the Rule on methods of vegetation clearance, I consider that Ms Dempster's acknowledgement about collateral damage was proper, but I am left to consider whether on the totality of the evidence there was in fact "clear felling" as opposed to collateral damage.

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[16] Affidavit of Helen Elizabeth Dempster dated 26 July 2019 (served on the Respondents on 1 August 2019) and Affidavit in reply of Helen Elizabeth Dempster dated 17 October 2019.
[17] *Dunedin City Council v Ross* [2020] NZEnvC 212 at [41]-[42].
[18] At [47]-[49].

Finally, addressing both exceptions to the rule, the Court held that:

> Given that Mr Ross was the only witness with experience of such activities, and lack of successful challenge to his evidence that the topography and other features of the land necessitated the approach he took, I conclude that the moderately extensive removal of vegetation was in fact collateral damage and not deliberate clear felling beyond the two exceptions in the Rule. Indeed, answers by Ms Dempster to immediately subsequent questions effectively acknowledged that the rule could be open to an interpretation that such consequences beyond the 20 m² limitation might be contemplated.
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> The above findings are reason enough to refuse the application for enforcement orders, but for completeness I will deal with the remaining grounds of opposition.

[26] I accept that the respondents had raised the above issues prior to the proceeding commencing. I also accept that the Council proceeded on the grounds that it had no answer for Mr Ross' evidence. For this reason, I find that the Council's case was without substance.

Did the Council take a technical and unmeritorious position?

[27] The respondents submitted that the Council took a technical position and failed when it relied on the use of aerial imagery of the Property to determine the existence of indigenous vegetation and the composition of vegetation.

[28] The respondents also considered that the Council took a technical position in seeking to deduce what might be "reasonable" clearance for the purpose of fencing, despite that not being a requirement in Rule 10.3.2.4.

[29] I agree with the respondents that no credible evidence was called by Council to demonstrate that the exception to the rule was workable or that the respondents' actions were unreasonable. In addition, Ms Dempster's evidence was strained at best, and involved expressions of opinion beyond her expertise. For these reasons I find that the Council took a technical and unmeritorious position.

Was there a possibility of settlement?

[30] The respondents' position is that the Council failed to explore the possibility of

settlement when it was appropriate for it to do so. In support of their position they provided the Court with the following timeline.

(a) The respondents circulated a settlement offer to the Council on 19 September 2019. The primary elements of the offer were that:

(i) The respondents would erect a fence in the south eastern corner of the property to protect the existing mature vegetation from stock as well as agreeing to refrain from clearing vegetation in that portion of the property.

(ii) The respondents would give up their entitlement to clear that vegetation to erect a boundary fence and effectively subdivide a section of the property which they could not use.

(iii) The Respondents sought that the Council reimburse them for the cost of engaging Mr Thorsen and a reasonable contribution towards their legal costs.

(b) The respondents submitted that the Council circulated a counter-offer for settlement dated 30 September 2019. There were no material differences between the counter-offer and the enforcement orders sought other than the request that 10 artificial *peripatus* habitats be established was withdrawn and each party would bear its own costs.

(c) The respondents did not accept the counter-offer on the basis that it imposed the same restrictions on their use of the property and had the same ongoing maintenance obligations as the orders sought in the enforcement application.

[31] The Council submitted that it explored the possibility of settlement and to demonstrate this it provided the Court with the letters it wrote to the respondents

prior to the application for enforcement orders being lodged.[19]

[32] The respondents contend that these attempts by the Council to settle were made prior to the enforcement order application being made, and are not relevant. They referred the Court to In *Royal Forest and Bird Protection Society of NZ Inc v Innes*, where the Court said:[20]

> … Forest and Bird is correct when it submits that this *Bielby* factor is mostly applied to behaviour in the course of a proceeding, rather than in the lead up to the lodging of an application (as is the case here).[21]

[33] I agree with the respondents' submission that the letters sent prior to the application for enforcement orders was lodged do not amount to an attempt to settle the matter. I also accept that the Council's refusal to settle on the basis offered by Mr Ross was objectively unreasonable and that the Council's counter-offer sought to impose almost the same restrictions on the property as the orders the Council sought. On this basis I am satisfied that the Council failed to explore the possibility of settlement.

Quantum

[34] Having determined that an award of costs is appropriate, I address the issue of quantum.

[35] Counsel for the respondents submitted that this a rare and exceptional case in which an award of indemnity costs is justified. They seek indemnity costs of $50,044.18 comprising the total costs incurred and including the costs of preparing this application. This figure comprises:

(a) Legal fees of $46,107.71; and

(b) Expert witness fees of $3,936.47.

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[19] Letters dated 4 June 2019 and 26 June 2019.
[20] *Royal Forest and Bird Protection Society of NZ Inc v Innes* [2014] NZEnvC 201 at [8].
[21] *Royal Forest and Bird Protection Society of NZ Inc v Innes* [2014] NZEnvC 201 at [8].

[36] The Council submitted that if the Court determines that it is appropriate to make an award of costs in this case it should a standard award.[22] It submitted that a standard award in the region of $7,964.50 - $10,513.14 would be the maximum that could be awarded in the circumstances of this case, being 25-33% of $32,155, such total being a reasonable quantum of costs calculated as follows:

(a) Actual legal fees and expert costs incurred *excluding* GST, totalling $42,658;

(b) Reduced by an appropriate amount due to duplication/two counsel costs, estimated at $8,000 (excl GST); and

(c) Further reduced by the approximate amount of legal fees relating to preparation of the costs application billed in the GCA invoice dated 19 January 2021, estimated at $2,800 (excl GST).

[37] Having considered the parties' submissions I find that this is a *Bielby*-type case because an application for enforcement orders should not have been used as a test case. Nevertheless, the award should be at 50% of the costs claimed because the respondents were not blameless concerning the dispute that erupted, having as I found on the evidence, taken a cavalier attitude to district plan matters at the outset of the proceeding before their lawyers started asking pertinent questions of the Council.

GST

[38] It was submitted on behalf of Council that GST should be excluded from the amount of costs sought.[23] This position is based on the approach of the Courts to exclude the GST component from indemnity costs if the successful party is able to recover the GST component. The rationale behind this is that a successful party would be able to recover the GST component twice.[24]

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[22] In support of this submission the Council referred the Court to *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2019] NZEnvC 36 at [11].
[23] *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [13].
[24] *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [14].

[39] In this case I have determined to make an award of costs of 50% of the costs incurred. It is well established that awards of scale costs are GST neutral and the successful party is not required to account for GST.[25] This approach to GST has also been demonstrated in Environment Court in cases such as *Mitchell v Auckland Council*[26] where the Court found:

> [12] …Scale costs in the District and High Courts (and general awards such as in the Environment Court) are treated as GST neutral such that the successful claimant is not required to account for GST and the party paying costs is not able to claim a GST input credit. This is because the award of costs represents a reasonable contribution to the costs actually and reasonably incurred and is not a payment for service provided by the claimant or its lawyers or consultants.[27]

[40] As I am not awarding indemnity costs, but instead awarding a reasonable contribution towards the respondents' costs, I hold that the respondents do not need to subtract the GST component from their invoices.

The cost of additional counsel

[41] The respondents had two counsel at the first hearing, and briefed Mr Andersen QC to appear at the second part of the hearing in place of Mr Page due to his unavailability. The Council submitted that multiple counsel were not warranted, and that in applying for the costs incurred by instructing Mr Andersen QC there is a duplication in the costs sought.

[42] Having considered the parties' submissions, I am satisfied that there is no duplication. Mr Andersen QC was only instructed because Mr Page became unavailable. Mr Pierce's involvement at the hearing provided consistency and knowledge of what had gone before. I determine that it is appropriate to include the costs incurred in instructing Mr Andersen QC in the costs award and that seeking compensation in relation to two counsel is valid in the circumstances.

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[25] *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [7].
[26] [2017] NZEnvC 064.
[27] *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282.

The legal costs of preparing the application for costs

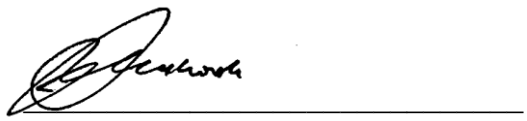
[43] Under s 285 of the Act the Court may award costs that include the costs of preparing an application for costs. Whether it is reasonable to include the cost of the preparing the application is determined at the Court's discretion on a case by case basis.[28]

[44] In this case I exclude the costs (of approximately $3,200) incurred by the respondents in preparing their application because I have not received express submissions from them as to why I should include them.

Decision

[45] For the reasons set out above, I make an award in favour of the respondents of approximately 50% of the costs they incurred. In determining the quantum, the costs incurred preparing the application for costs (of approximately $3,200) have been deducted.

[46] S and M Ross are awarded costs of $23,000 against the Dunedin City Council.



L J Newhook
Alternate Environment Judge

[28] *Picard v Tasman District Council* [2011] NZEnvC 198 at [10].