IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 11

IN THE MATTER	of the Local Government Act 1974
AND	an application pursuant to s342 and the Tenth Schedule to stop part of an unformed road adjoining Owaka Highway
BETWEEN	CLUTHA DISTRICT COUNCIL
	(ENV-2021-CHC-002)
	Applicant
AND	PIETER JOHN VREUGDENHIL, MARIE ELIZABETH VREUGDENHIL AND LEE McAUSLAN AS THE TRUSTEES OF BOTH THE P J AND M E VREUGDENHIL FAMILY TRUST PARTNERSHIP
	Respondents

Court:	Environment Judge P A Steven
Hearing:	In Chambers at Christchurch on the papers
Last case event:	27 January 2022
Date of Decision:	8 February 2022
Date of Issue:	8 February 2022

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 Resource Management Act 1991, Clutha District Council and the Vreugdenhil Family Trust Partnership are to pay Mr and Mrs Kelly the sum of $7,285.875 each, as a contribution towards costs.

B: Under s286 Resource Management Act 1991, this order may be filed with the District Court at Dunedin for enforcement purposes (if necessary).

REASONS

Introduction

[1] This matter relates to an application by Clutha District Council ('the Council') to stop part of a road[1] following public notification of the proposal[2] as required by the road stopping provision in s342(1)(a) and Schedule 10 of the Local Government Act 1974 ('LGA').

[2] Pursuant to Schedule 10 clause 2-5 of the LGA, the Council publicly notified the proposed stopping, which was met with six objections in opposition. Although some of the objections were allowed, the Council subsequently resolved to refer the proposed stopping of section 1 SO 546517 to the Environment Court.

[3] The substantive decision[3] on this matter was issued on 26 November 2021, declining the Council's application. Costs were reserved and a timetable set for any applications. Mr and Mrs Kelly ('the Kellys'), s274 parties to this appeal, filed an application for costs on 17 December 2021, and that application is now considered on its merits.

The Kellys' application for costs

[4] The Kellys seek a costs award against the Council and the Vreugdenhil

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[1] Unformed road adjoining Owaka Highway shown as section 1 of SO 546517.
[2] As notified in the Clutha Leader on 11 June 2020.
[3] *Clutha District Council v Vreugdenhil* [2021] NZEnvC 183.

Family Trust Partnership ('the Trust') of $17,500.00, being 60% of its total costs incurred. Their total costs comprise:

(a) legal fees inclusive of GST of $27,979.50;
(b) office services inclusive of GST of $705.00; and
(c) disbursements of $459.00.

[5] The Kellys submit that the Council and the Trust contribute towards their costs incurred at a higher than standard level because:

(a) there was an absence of legitimate basis for the Council's application for road stoppage;
(b) the Council failed to recognise at an early stage the merits of the Kellys' opposition to the stopping;
(c) the Trust failed to explore the possibility of settlement through mediation, when a compromise could have reasonably been expected; and
(d) the Trust failed to respond to the Kellys' "*Calderbank*" letter of 16 June 2021, which invited the Trust to withdraw the application for road stoppage without costs.

[6] They also submit that pursuant to *Aitchinson v Wellington City Council*[4] and consequently the factors identified in *Bielby,*[5] the above factors are aggravating and adverse which justify higher than standard costs.

The Council's reply

[7] In its reply of 20 January 2022, the Council considers that costs sought against it should lie where they fall. It submits that in the normal course of proceedings, a local authority such as the Council will not be subject to an award

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[4] *Aitchinson v Wellington City Council* [2018] NZHC 1674 at [33].
[5] *DFC New Zealand v Bielby* [1991] 1 NZLR 587 (HC).

of costs unless the Council has acted in an adversarial or partisan way during the court proceedings.

[8] In this instance, the Council advise that it did not take a partisan position on behalf of either the Trust or the Kellys, and accordingly there is no justification for costs against it.

The Trust's reply

[9] Counsel for the Trust filed their reply to the Kellys' costs application on 21 January 2022. They also submit that the costs sought by the Kellys should lie where they fall, for the following reasons:

(a) the Trust was seeking from the Council a resolution of the ongoing dispute between themselves and the Kellys, which began when the Kellys erected a fence with Council permission on land owned by the Trust's interests;
(b) all parties are equally involved in this matter, and it would therefore be unconscionable for the Trust to make a payment towards costs; and
(c) the issue of road realignment will continue to fester until one of the parties leaves the area.

Section 285 Resource Management Act and related principles

[10] The LGA is silent on the issue of costs, although past decisions have addressed this issue by using the court's general powers under s285 of the Resource Management Act 1991 ('RMA').[6]

[11] Under s285 RMA, the court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. This confers a broad

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[6] *Re Westland District Council* [2012] NZEnvC 154 at [10].

discretion. The court is guided by a body of general principles developed through the case law and recorded in the court's Practice Note and that guidance is useful in this context.[7]

[12] In RMA proceedings, the court does not as a matter of general practice allow costs to a successful party, unless there are special circumstances by which it would be fairer to depart from that rule.[8] The purpose of a costs award is not to penalise the unsuccessful parties, but to compensate successful parties where that is just.[9] This statutory discretion must, however, be exercised in a principled way.[10]

[13] In determining an application for costs the court will make two assessments.[11] 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.

[14] While there is no scale, an award of costs has tended to fall into three broad categories:[12]

(a) standard costs, which generally fall within a comfort zone of 25-33% of costs actually incurred, although in any given case costs awarded might be either above or below this comfort zone;
(b) higher than normal costs, where aggravating or adverse factors might be present such as those identified in *Bielby*; and
(c) indemnity costs, which are awarded only rarely, in exceptional circumstances.

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[7] Environment Court Practice Note 2014, at clause 6.6.

[8] *Culpan v Vose* (1993) 1A ELRNZ 331, (1993) 2 NZRMA 380.

[9] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385, (1996) 2 ELRNZ 138.

[10] *New Zealand Heavy Haulage Association Inc v Central Otago District Council* EnvC W72/2004 at [5].

[11] *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

[12] *Thurlow Consulting Engineers & Surveyors Ltd v Auckland Council* [2013] NZHC 2468; as acknowledged in *Bunnings Ltd v Hastings District Council* [2012] NZEnvC 4 at [35].

[15] However, the further scenario is where no costs are awarded at all. This would normally be the position in relation to plan appeals under Schedule 1 or in cases where some aspect of the public interest counts against an award of costs being made.

Evaluation

[16] The Trust and the Council were both party to the High Court settlement agreement, pursuant which it was agreed that the Council would shepherd a proposal to close part of the legal road up to receipt of any objections, at which point if objections were lodged, the Trust would pursue the proceedings through the Environment Court.

[17] The Council notes in its submissions that this was undertaken, despite not seeing any merit in the civil proceedings that had been commenced against it by the Trust.[13] As agreed with the Trust, the Council stood back and allowed the Trust to lodge the original proposal in the court following receipt of the one objection from the Kellys that was not allowed by the Council.

[18] Following the court's direction, the proceedings were subsequently replaced with proceedings duly commenced by the Council as proponent of the road stopping proposal as provided for by Schedule 10 LGA.

[19] From that point, the Council took a neutral position. In fact, as the decision records, the Council initially sought to withdraw from the hearing. However, that application was declined as it is not consistent with the court's expectations of a council in this context. The Council has a role to assist the court in explaining to it the Schedule 10 information requirements.

[20] Generally, if a council appears as a neutral party in a proceeding, costs may

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[13] Submissions on behalf of the applicant, dated 20 January 2022 at [2].

not be appropriate.[14] Here, the Council submits that throughout the proceeding, it undertook a neutral position and therefore costs are not warranted. However, and noting what is said above about the court's expectations of a council in this context, I do not consider that the Council took an entirely neutral position.

[21] I concur with the Kellys' submission that the road stopping process was undertaken out of obligation to the Trust as a result of the settlement agreement on an unrelated civil proceeding to which the Kellys were not a party.

[22] Moreover, the Council's decision to withdraw sections 2, 3 and 4, and to continue with the road stopping application for section 1, would clearly affect access to the Kellys' property and the Council ought to have been cognisant of that fact. The Council's position was not entirely neutral vis-a-vis the neighbouring landowners, in that it failed to consider the consequences of the road stopping on the Kellys' property, an admission now made through its counsel.

[23] I also note the similarities here to *Re Manawatu District Council*, in which the court awarded costs in circumstances where the Council had failed in its duty to properly consider the access needs of a landowner when pursuing a road stopping proposal which resulted in the landowner having to incur legal costs.[15]

[24] The Trust is in a similar position as to liability towards the Kellys. The High Court litigation, which ultimately resulted in the settlement, is said to stem from a dispute between the Trust and the Kellys as to occupation of the land. However, no evidence had been given about that at the hearing, despite questioning Mr Vreugdenhil about the connection to the road stopping (if there was one) and nor was the Council able to assist.

[25] I am unable to accept the factual assertions contained in the submissions

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[14] *Aitchison v Wellington City Council*, above n 4.
[15] *Re Manawatu District Council* [2010] NZEnvC 433 at [19].

file by the Trust in relation to this issue.

[26] Similarly, I am unable to find that all parties were "equally involved", as the Trust contends in counsel's submissions. Rather, as the Kellys were not party to the original settlement agreement, I agree that they have had to undertake further steps to protect their continued use of the road in circumstances where that consequence had not been properly considered by the Council.

[27] Moreover, previous case law has established that landowners who benefit and encourage road stoppage potentially face liability with, or instead of, the Council.[16] I conclude that costs are to be awarded against the Council and the Trust to the Kellys, on an equal basis.

Quantum

[28] Having found that there should be an award of costs, the next question is the quantum of costs. This includes an assessment of the reasonableness of costs incurred and what is a reasonable contribution.

Reasonableness

[29] Under s285 of the RMA, the court must consider whether the actual costs said to be incurred are reasonable.

[30] The Kellys submit that the costs incurred are reasonable in the circumstances, given the amount of preparation required for this proceeding. I accept the view that the Kellys had to undertake legal costs to defend their access to their property. Roads are for public use, and the Council ought not to have commenced a road closure in the circumstances it did on this occasion without considering the implications of the closure for the people who use it.

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[16] *Re Auckland Council* [2012] NZEnvC 40 at [16].

[31] Regarding the Trust, the settlement agreement ultimately stems from a property interest dispute that involved the Kellys. The Trust would therefore have also understood the implications of the settlement agreement on the Kellys, but nonetheless agreed to it.

[32] The Kellys nevertheless were put to the cost of taking their case to the court in circumstances where the Council ought to have considered their needs for the road more carefully before agreeing to commence the process.

[33] I am therefore satisfied that the costs incurred by the Kellys were reasonable in the circumstances, and ultimately because of the settlement between the Trust and the Council.

Contribution

[34] The next question is what a reasonable contribution to the costs in the circumstances is.

[35] I agree with the Kellys that there are aggravating features of the Council's conduct, alongside their decision to undertake a road closure without consideration of those affected. Given the Council and the Trust's settlement agreement, both parties appeared to treat the proceeding before the court as a civil case between neighbours. This is exacerbated by the Council's submission that they attempted to remain neutral, despite having a duty to assist the court on relevant LGA matters.

[36] In all the circumstances, an elevated award of costs is just. However, while I consider that a more than nominal amount split between the Council and the Trust is warranted, I do not think that the factors present permit an award of 60%. Ultimately, the matter was a one-day hearing with an absence of expert witnesses. This warrants a reduction, albeit minor, in the quantum the Kellys seek.

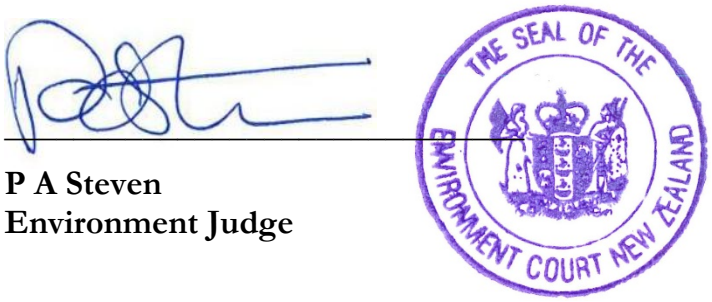
[37] I therefore conclude that an award of 50% of the Kellys' costs, divided

equally between the Trust and the Council, is reasonable.

Outcome

[38] Under s285 RMA, Clutha District Council and the Vreugdenhil Family Trust Partnership are to pay the Kellys the sum of $7,285.875 each, as a contribution towards its costs.

[39] Under s286 RMA, this order may be filed with the District Court at Dunedin for enforcement purposes (if necessary).



P A Steven
Environment Judge