IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2023] NZEnvC 183

IN THE MATTER	of an appeal against an abatement notice under s 325 of the Resource Management Act 1991
BETWEEN	W NORTH LIMITED
	(ENV-2021-WLG-000028)
	Appellant
AND	WELLINGTON REGIONAL COUNCIL
	Respondent

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	In Chambers
Last case event:	17 April 2023
Date of Decision: (On the papers)	29 August 2023
Date of Issue:	29 August 2023

DECISION OF THE ENVIRONMENT COURT

A. Costs awarded to W North Ltd in the sum of $23,686.34.

REASONS

Introduction

[1] In 2017, W North Ltd was granted a resource consent by Wellington Regional Council (**Regional Council**) relating to a subdivision and development in northern Waikanae. In 2021, as W North Ltd was giving effect to that consent, the Council raised an issue concerning the possible existence of a wetland on the property (as defined by the proposed Natural Resources Plan and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020). The Council then issued an abatement notice to W North Ltd, asserting that the area in question was a wetland, and that what W North Ltd proposed was outside the terms of its resource consent, and was unlawful.

[2] W North Ltd appealed that notice and applied for a partial stay to enable the construction of an access road and services to continue. The Court issued a decision on 22 October 2021 granting the Appellant a stay of the abatement notice.[1] The Regional Council subsequently cancelled the abatement notice on 9 March 2022. It did so following the Court's decision in *Greater Wellington Regional Council v Adams*, in which the Council failed to convince the Court that a wetland it had identified on a site in Upper Hutt constituted a natural wetland.[2] A hearing of the substantive issues in this case was therefore not required. The parties have been unable to resolve the issue of costs.

[3] W North Ltd has applied for indemnity costs in the sum of $118,431.71 (GST exclusive). It submits that the Regional Council unlawfully issued an abatement notice without any evidential foundation and unjustifiably resisted the stay application. W North Ltd also submits that the Council doggedly and unreasonably refused to cancel the abatement notice for five months after the partial stay hearing. It submitted that the Council unduly restricted its rights, and advanced unmeritorious arguments to its

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1 *W North Ltd v Greater Wellington Regional Council* [2021] NZEnvC 166.
2 *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25.

significant detriment.

[4] The Regional Council submits that indemnity costs would be wholly out of proportion with what is reasonable in the circumstances. It considers costs should lie where they fall and submits that at all times in conducting this proceeding it has acted prudently and reasonably. Specifically, the Council considers that it has acted in good faith to discharge its responsibilities and functions under RMA to protect natural wetlands, and updated its position in light of the *Adams* judgment, at the earliest stage available to it.

Discussion

[5] Section 285 of the RMA confers a broad discretion. The Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by that other party in a proceeding. While the Environment Court Practice Note 2023 sets out guidelines in relation to costs, it does not create an inflexible rule or practice.[3] Nor is there any scale of costs under the RMA.

[6] Relevantly, the Environment Court does not have a general practice that a successful party is generally entitled to costs.[4] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[5]

[7] As such, when considering an application for costs, the court will make two assessments. The first assessment is whether it is just in the circumstances to make an award of costs. If it is, the second assessment will concern what quantum of costs is appropriate.

[8] With regard to quantum, while there is no scale of costs, awards have generally fallen into three categories:

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3 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 (HC) at [21].

4 *Culpan v Vose* A064/93.

5 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

(a) Standard costs which generally fall within the comfort zone of 25 per cent to 33 per cent of costs actually incurred;

(b) Higher than normal costs where aggravating adverse factors might be present; and

(c) Indemnity costs which are awarded only rarely and in exceptional circumstances.

[9] As set out in the Practice Note, where higher than normal costs are being considered, the decision in *DFC NZ Ltd v Bielby* sets out five factors to be taken into account:[6]

(a) Where arguments are advanced without substance;

(b) Where there is an abuse of process;

(c) Where the case is poorly pleaded or presented;

(d) Where a settlement option might reasonably be explored and was not;

(e) Where a party takes an unmeritorious or technical point of defence and fails.

Is an award of costs warranted?

[10] The Council submits that "the area of law and policy regarding the determination of wetlands under the Resource Management Act (the **RMA**) has in recent times been dynamic, and there continues to be changes in the relevant regulatory framework, the informing policy and its intent, what tests and procedures are relevant and should be followed, and courts' interpretation of the same".[7]

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6 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

7 Council submissions on costs dated 17 April 2023 at [20].

[11] The Court accepts that submission and agrees that when considering costs, there is a need to take account of the "underlying difficulty with the legislation".[8] . There is little doubt that at its inception the National Policy Statement – Freshwater Management 2020 and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 created an uncertain regulatory environment for all those exercising responsibilities within the area of freshwater management.

[12] Against that background, however, it is clear that the Regional Council failed to conduct a thorough review of the relevant resource consents held by the Appellant prior to the issue of the abatement notice. Moreover, the potential solutions offered by the Appellant to the Regional Council (in a dynamic regulatory environment) were, as Judge Thompson said, "appropriate and principled".[9]

[13] As set out in clause 10.7(d) of the Practice Note, "the Court will not normally award costs against a public body whose decision is the subject of the appeal unless it has failed to perform its duties properly or has acted unreasonably".

[14] Council's failure to carefully consider the potential solutions to a "new" problem in a dynamic regulatory environment together with its inadequate review and knowledge of the existing consents held by the Appellant demonstrate a want of care on the part of the Regional Council that indicates a failure to perform its duties properly.

[15] While this want of care is at the lower end of what might constitute unreasonable practice on the part of a public body I find that an award of costs to W North Ltd is nonetheless appropriate.

Quantum

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8 Citing *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577 at [24].

9 *W North Ltd v Greater Wellington Regional Council* [2021] NZEnvC 166 at [18].

[16] I do not find that this is a case in which a higher than normal award of costs is warranted. Nor does it meet the test for indemnity costs. The Regional Council may have been somewhat over-zealous in its interpretation of the freshwater management requirements but there is no evidence that the point was entirely unmeritorious given the interpretation issues which were extant at the time, nor that it was vexatious or an abuse of process. Moreover, the Regional Council did withdraw the notice once the *Adams* judgment had been considered and applied.

[17] That said, the costs sought in this case by W North Limited are significantly higher than might be expected given the matters that were at issue before the Court.

[18] I therefore conclude that while an award of costs should be ordered, 20 per cent of actual costs incurred is appropriate.

Order

[19] The Wellington Regional Council is to pay costs to W North Ltd in the sum of $23,686.34. This award is enforceable, if need be, at the District Court in Wellington.

L J Semple
Environment Judge