IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2023] NZEnvC 197

IN THE MATTER OF	an appeal under s 325 of the Resource Management Act 1991
BETWEEN	HPC PLUMBING & GAS LIMITED
	(ENV-2022-AKL-000235)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge MJL Dickey
Hearing: Last case event:	On the papers 28 August 2023
Submissions:	B Carruthers KC for HPC Plumbing & Gas Limited J Carter for Auckland Council
Date of Decision:	13 September 2023
Date of Issue:	13 September 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s 285 Resource Management Act 1991 the Environment Court declines the application by HPC Plumbing & Gas Limited for costs against Auckland Council.

B: Costs are to lie where they fall.

REASONS

Introduction

[1] On 23 November 2022, HPC Plumbing & Gas Limited (**HPC**) filed an appeal against an abatement notice issued by Auckland Council (**the Council**) on 4 November 2022 to cease a commercial activity at 14 Lake Drive, Papakura. The appeal sought cancellation of the abatement notice on the basis that the activity complies with the relevant standard of the Auckland Unitary Plan (**AUP**).

[2] On 8 February 2023, a limited stay of the abatement notice was granted until 15 March 2023 to enable discussions to occur.

[3] Following mediation on 19 April 2023 and further discussions, the parties reached an agreement. By memorandum dated 28 June 2023, the Council in accordance with s 325A(2) RMA gave written notice that the abatement notice was cancelled.

[4] HPC has applied for costs against Auckland Council.

HPC application for costs

[5] HPC seeks costs of $10,000 against Auckland Council. Given that is nearly the sum total of invoices rendered, this is a claim for indemnity costs against the Council.

[6] It is acknowledged that costs generally lie where they fall for matters resolved at mediation. Ms Carruthers submits, however, that the general approach seems grossly unfair in this circumstance; the abatement notice should never have been issued. She submits it is implausible that tradespeople are conducting non-complying activities at their homes if they have one or two visitors a day and a delivery from a light commercial vehicle once or twice a week. This is a minimal level of activity, far less than what is permitted under the Home Occupation rules. Ms Carruthers submits the Council's position was nonsensical.

[7] Ms Carruthers further submits that, of the factors set out in Clause 10.7(j) of the Practice Note 2023:

(a) the Council's position that the activity was a commercial business activity triggering non-complying activity status was without substance;

(b) the Council conducted itself in a way that unnecessarily lengthened the case management process; and

(c) the Council failed to explore reasonably available options for settlement until it attended mediation, despite regular and repeated efforts to resolve matters swiftly.

Auckland Council submissions

[8] Auckland Council submits costs should lie where they fall.

[9] Mr Carter submits there was a reduction in the previous level of activity that triggered the complaint.

[10] The Council denies it conducted itself in a manner that unnecessarily lengthened the case management process. Mr Carter submits:

(a) there were discussions with HPC and attempts to negotiate before the abatement notice was issued;

(b) HPC went straight to the appeal process when it could have suggested mediation outside the court process;

(c) although it accepts that HPC's counsel requested further information, that focused upon the abatement notice being cancelled. There appeared to be no movement to resolve the issues and activity that led to the abatement notice being issued; and

(d) the Council did not oppose the stay application in order not to prejudice the business of HPC while the matter went into the judicial process.

[11] Mr Carter disputes the characterisation of the mediation as brief, submitting resolution was only reached once HPC and council officers discussed matters directly without the intervention of counsel.

[12] The Council denies that there was any neglect of its duty, that it has acted unreasonably or that its actions were blameworthy. Mr Carter submits the Council acted correctly and with due regard to its statutory responsibility to enforce the RMA and AUP. The investigation was conducted with all due diligence.

[13] Mr Carter reiterated this matter was resolved at mediation and the matter did not progress to a hearing.

Costs in the Environment Court

[14] Under s 285 of the Resource Management Act 1991, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. There is no scale of costs under the RMA. The Environment Court Practice Note 2023 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or practice.[1]

[15] There is no general rule in the Environment Court that costs follow the event.[2] The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it would be fairer to depart from that rule.[3] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[4]

[16] When considering an application for costs the Court will make two assessments: first whether it is just in the circumstances to make an award of costs and second, having determined that an award is appropriate, deciding the quantum of costs to be

---

[1] *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].
[2] *Culpan v Vose* A064/93.
[3] *Culpan v Vose* A064/93.
[4] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

awarded.[5]

[17] 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 in cases where some aspect of the public interest counts against any award being made;

(b) standard costs, which generally fall between 25 – 33% of the costs actually and reasonably incurred by a successful party (sometimes referred to 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.

[18] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessments of whether to award costs and what the quantum should be if they are present in a case:[6]

(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 the hearing;

---

[5] *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.
[6] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

(d) where it becomes apparent that 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 and fails; and

(f) whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

Costs against councils

[19] The well-established principle of costs is that they will not be awarded against a statutory decision-maker in the absence of special circumstances.[7] This is reflected in the Court's Practice Note, which states that 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 it has acted unreasonably.[8]

[20] 'Special circumstances' is a high threshold. For instance, costs have been awarded against a Council where part of its case was irrelevant, had lacked substance, and had been incapable of providing an acceptable basis for its findings, thereby adding to the costs of the applicant.[9]

Should there be an award of costs?

[21] Agreement was reached through mediation and discussion. Following this the abatement notice was cancelled. In most cases where negotiations take place and lead to resolution, without a hearing, costs are unlikely to be an issue and will lie where they fall.[10] In the interests of good faith negotiations, it would not be conducive to settlement of cases if parties were nonetheless made liable for extensive costs.[11]

---

[7] *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 at [12] (CA).
[8] Practice Note 2023, clause 10.7(d).
[9] Contact Energy Ltd v Waikato Regional Council [2002] NZRMA 12.
[10] *East Bay Conservation Society Incorporated v Marlborough District Council* C 154/06.
[11] *BridgeCorp Ltd (in receivership) v Hamilton City Council* A021/08.

[22] The issuing of an abatement notice is a serious step. Non-compliance can lead to further enforcement action, for example prosecution. Care needs to be taken by a Council to satisfy itself that circumstances exist that justify the issue of an abatement notice.

[23] HPC has strongly criticised the Council for issuing the notice. An appeal was filed, and a stay obtained. The Council states that it was justified in issuing the notice and that there has been a reduction in the previous level of activity that triggered the complaint. This seems to be supported by Ms Carruthers' email to Mr Carter of 21 March 2023.[12] Further there was a change made to the activity in that the appellant agreed to cease hiring a refuse bin and was to cease disposing of commercial waste at the property.

[24] It is difficult for the Court to determine the merits of a case for costs purposes when settlement has been achieved without a hearing. I cannot test the strength of HPC's grounds of appeal and its allegations, or the Council's explanations for its actions in issuing the notice as the matter did not go to hearing. Further, as far as I am aware no evidence was prepared.

[25] The Court was not required to reach a decision as to whether this abatement notice should have been confirmed or not. The Court cannot, therefore, make a finding as to whether the Council failed to perform its duties properly or if it has acted unreasonably. The most that could be said is that nothing in the material before the Court establishes that the Council acted in bad faith or in a blameworthy manner.

[26] I note that the Council agreed to the stay of the abatement notice. I accept this would have meant the business of HPC would not be prejudiced while the matter went through the judicial process.

[27] Overall, I am of the view that it would not be just to award indemnity costs against the Council. Costs should lie where they fall.

---

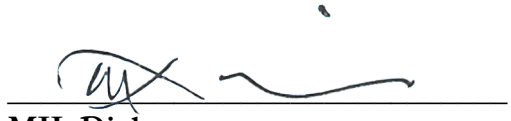
[12] HPC's submissions, Annexure G.

Outcome

[28] Under s 285 Resource Management Act 1991 the Environment Court declines the application by HPC Plumbing & Gas Limited for costs against Auckland Council.

[29] Costs are to lie where they fall.

For the Court:



MJL Dickey
Environment Judge