

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH  
I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHĪ**

**Decision No. [2023] NZEnvC 266**

IN THE MATTER of the Resource Management Act 1991

AND appeals under s120 of the Act

BETWEEN GRAEME MORRIS TODD, JANE  
ELLEN TODD AND JOHN  
WILLIAM TROON

(ENV-2019-CHC-108)

MICHAEL CAMERON BRIAL  
AND EMILY JANE O'NEIL  
BRIAL

(ENV-2019-CHC-114)

Appellants

AND QUEENSTOWN LAKES DISTRICT  
COUNCIL

Respondent

AND S AND S BLACKLER AND SLOPE  
HILL FARM TRUSTEE LIMITED

Court: Environment Judge J J M Hassan

Hearing: On the papers

Last case event: 31 May 2023

Date of Decision: 6 December 2023

Date of Issue: 6 December 2023



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## DECISION OF THE ENVIRONMENT COURT AS TO COSTS

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- A: Under s285 RMA,<sup>1</sup> Michael Cameron Brial and Emily Jane O’Neil Brial are ordered to pay S and S Blackler the sum of \$20,400 as a contribution towards the Blackler’s costs in this proceeding.
- B: Under s285, Graeme Morris Todd and Jane Ellen Todd are to pay S and S Blackler the sum of \$19,000 as a contribution towards the Blackler’s costs in this proceeding.
- C: Under s286 RMA, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

## REASONS

### Introduction

[1] S and S Blackler and Slope Hill Farm Trustee Limited (‘the Blacklers’) seek costs against Graeme Morris Todd, Jane Ellen Todd and John William Troon (‘the Todds’) and Michael Cameron Brial and Emily Jane O’Neil Brial (‘the Brians’). The Todds and the Brians were unsuccessful appellants in relation to a decision of the Queenstown Lakes District Council (‘QLDC’) that granted resource consent to the Blacklers for a two-lot subdivision and associated activities at a site (‘Site’) on Slopehill Road, Wakatipu Basin, in rural Queenstown.

[2] Due to COVID-19 pandemic restrictions, the hearing and determination of the appeal was staged. On 11 December 2020, the court issued an interim decision confined to addressing so-termed community-scale issues and finding none of those counted against grant of consent. Following that, on 19 March 2021

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<sup>1</sup> Resource Management Act 1991.

the Blacklers made their first costs application.

[3] The Todds withdrew as a party to the proceedings shortly thereafter, on 27 April 2021.

[4] As a result of the Brians' appeals against the court's first decision, which proved unsuccessful, the second tranche of the hearing of the appeal was delayed. Following that hearing (on the papers) the court's final decision confirming grant of a two-lot subdivision was issued on 30 March 2023. The Blacklers made their further application for costs on 10 May 2023, seeking that the order against the Brians be increased by \$2,152.87 as a contribution to their remaining costs up to the issue of the final decision.

[5] The Blacklers, therefore, seek an order totalling \$56,913.05, calculated at 30% of actual legal and expert costs, with the Brians being apportioned \$29,532.96 and the Todds \$27,380.09.

### **Submissions**

[6] It is convenient to address all matters on both applications together. Counsel address relevant principles. As these are well settled, I discuss only relevant points of difference on how those should bear on the consideration of the applications.

### ***The Blacklers***

[7] The Blacklers submit that, on the proper application of relevant principles, an order for costs of the quantum they seek should be made. In addition to noting they were the successful party in facing the appeals, they submit that they conducted their case both reasonably and efficiently to minimise all parties' costs. In contrast, they characterise the Todds and the Brians as having made no effort to narrow the issues or suggest changes to the proposal to resolve matters. They further submit that the Todds' "only concern" was the imposition of a covenant

on the Site. They pursue costs according to the ‘standard’ band, submitting that an award of 30% of actual costs should be made.

### ***The Brians***

[8] The Brians counter that this is not a case where costs should automatically follow the outcome and they conducted their case reasonably.<sup>2</sup> They elaborate that they were willing participants in mediation, which could have assisted in narrowing issues, and their arguments were advanced with substance.

[9] Whilst maintaining their primary position on those matters, the Brians submit that, if the court is minded to make an order, the starting point should be at the lower end of the standard band. They submit that, in addition to recognising the reasonable conduct of their case, the court should also note that it endorsed the Brians’ position on the weight to be afforded to the PDP. This includes giving recognition to the “test case” element of the case. Hence, they submit that any award should be in the vicinity of \$10,000 to \$15,000 in total, representing approximately 15% of a more reasonable total of legal and expert costs incurred.

### ***The Todds***

[10] The Todds filed submissions on the initial application for costs, prior to withdrawing as a party to the proceedings on 27 April 2021. Aside from then submitting that the application was premature, they submit that an order is in any case inappropriate. They respond that it is inaccurate for the Blacklers to assert that their interests were confined. Rather, they were concerned about the effects of the proposal, including cumulatively on them and the environment generally. Their interest in the covenant was a means of preventing further subdivision of the Site. Whilst they did not call evidence, the Todds submit that they were entitled to make their case on the evidence of Mr Brown and Ms Panther-Knight as was

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<sup>2</sup> Submissions for Michael and Emily Brial in response to Application for Costs dated 1 April 2021.

called by the Briers.

[11] Furthermore, in the event the court considers an award appropriate, the Todds submit that the legal fees claimed to have been incurred by the Blacklers are excessive and unreasonable for a two-day hearing. Whilst acknowledging exigencies arising from COVID-19, Mr Todd suggests that a reasonable level of fees for such a hearing would be in the order of between \$40,000 to \$60,000. As to that, he points out that the invoices supplied do not provide a detailed breakdown of time records.

### ***The Blacklers' reply***

[12] The Blacklers dispute that their costs are excessive. They submit that claimed 'test case' dimensions do not warrant any discount.<sup>3</sup>

### **Principles**

[13] Under s285 RMA, the court has a broad discretion to order any party to pay a reasonable contribution towards the reasonable costs and expenses incurred by any other party. The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.<sup>4</sup> In contrast to the High Court, the Environment Court does not apply any general practice that a successful party is entitled to costs unless there are special circumstances.<sup>5</sup>

[14] There is no scale of costs, but the Environment Court Practice Note 2023 sets out guidelines.<sup>6</sup> In the absence of aggravating factors, I am concerned with the standard band, where awards generally fall between 25% to 33% of the costs actually and reasonably incurred by a successful party.

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<sup>3</sup> Applicant's reply regarding costs dated 14 April 2021.

<sup>4</sup> *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.

<sup>5</sup> *Culpan v Vose* A064/93.

<sup>6</sup> *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].

## Evaluation

[15] In essence, the appeals effectively compelled the Blacklers to become involved to defend their position, and they were successful.<sup>7</sup> All parties duly cooperated and assisted the court to hear and determine matters efficiently, including in managing the added complications of the COVID-19 pandemic.

[16] There was an element of a test case involved, particularly as to the relative weighting and intentions of proposed district plan provisions. Indeed, on this aspect the court's findings materially differ from those of the first instance commissioners. I should acknowledge that this context would have caused all parties to have incurred higher costs than would be more typical in a simple two-lot subdivision appeal.

[17] The Blacklers apply for costs in two tranches. For the period up to and including the court's first interim decision, the application indicates that they incurred costs of \$189,710.15 (including GST). Those costs comprised legal costs of \$117,184.05 and expert witness costs of \$72,526.10. Their second tranche of costs were in relation to legal work associated with the court's final decision, by which stage the Todds were no longer involved. For this tranche, their application indicates legal costs of \$7,176.22 were incurred (not including costs from May 2022 as being attributable to higher court appeal matters).

[18] At first glance, the legal costs do appear high for a two-lot subdivision appeal involving two hearing days (with the balance decided on the papers). However, I am mindful that the Blacklers faced a number of complications in order to properly respond to the issues in the appeals. The appeals called for all relevant matters to be tested, both at a community and individual amenity value scale. That complexity fairly led the Blacklers to seek assistance from landscape assessment, traffic, surveying and planning experts. Associated with that was the

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<sup>7</sup> *Thornley v Sandford Ltd* [2019] NZEnvC 129 at [17].

complexity in associated legal advice, including to inform a strategy for honing issues and ensuring matters were able to be confined to a two-day hearing.

[19] That was in the context, as noted, of the new proposed plan provisions where the court's findings materially differed from those of the first instance commissioners.

[20] Given all matters, I am satisfied that the Blacklers engaged legal and expert assistance that was appropriate and proportionate in order that they could successfully defend the grant of consents in the face of the issues presented by the appeals.

[21] Therefore, I accept the Blacklers stated position on actual legal and expert costs and find those costs reasonable in the circumstances.

[22] The 'precedent' dimensions to the appeal involved additional costs from all parties and it is fair that this is acknowledged. Furthermore, as for where matters sit within the standard band, I give some credit to the Brians and the Todds for the fact that they together avoided duplication and wastage, and cooperated to ensure a fair and efficient hearing despite the challenges of COVID-19.

[23] Therefore, I determine that the global contribution should be in the order of 20% of actual costs.

[24] I agree that the proposed allocations between the Brians and the Todds is fair and appropriate.

[25] For the first tranche of costs, as co-appellants, they effectively ran a case in which they shared their resourcing. More precisely, the Todds were able to rely on the evidence called by the Brians. Each fully participated in relevant respects, including in submissions and cross-examination of the Blacklers and QLDC witnesses. For this tranche, therefore, they should contribute in equal shares.

[26] For the second tranche, which followed some time after the Todds withdrew, it is reasonable that the Brians bear the appropriate burden.

### **Outcome**

[27] Under s285 RMA, it is ordered the following sums are to be paid to the Blacklers as contributions to their costs in this proceeding:

- (a) the Brians are to pay the sum of \$20,400;
- (b) the Todds are to pay the sum of \$19,000.

[28] Under s286 RMA, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).



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**J J M Hassan**  
**Environment Judge**

