IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 267

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	PHILIP JOHN WOOLLEY
	(ENV-2020-CHC-123)
	Appellant
AND	MARLBOROUGH DISTRICT COUNCIL
	Respondent

Court:	Environment Judge P A Steven sitting alone under s279 of the Act
Hearing:	In chambers on the papers
Last case event:	28 November 2023
Date of Decision:	8 December 2023
Date of Issue:	8 December 2023

DECISION OF THE ENVIRONMENT COURT

A: Under s285 Resource Management Act 1991, Marlborough District Council is to pay Philip John Woolley the sum $18,000 as a contribution towards costs.

B: Under s286 RMA, this order may be filed in the District Court at

Wellington for enforcement purposes (if necessary).

REASONS

Introduction

[1] Mr Philip Woolley ('the appellant') has sought an award of costs against the Marlborough District Council ('the Council') in relation to the appeal in the sum of $40,239.56.

Background

[2] The appeal was filed by the appellant in 2020. Many of the appellant's complaints about the Council's conduct relate to pre-appeal matters and must be ignored, although it is relevant to describe the context of the application.

[3] The application giving rise to the appeal involved the transfer under s136 of the Act of a water use permit for farming uses including viticulture. The s136 application was required because the water was to be used on a site other than that to which the take and use permits (the underlying permits) had been granted. The Council had granted the underlying permits in 2010.

[4] The underlying permits had been the subject of intervening s136 transfers to third parties in relation to the use of the water for viticulture. However, in the decision under appeal, the commissioner held that the underlying permits had been granted beyond the scope of the original application.

[5] The commissioner declined the s136 application and held that there was no jurisdiction to allow the water to be used for viticulture, notwithstanding that the underlying permits expressly allowed the water to be used for that purpose. The Council was clearly *functus officio* in relation to that 2010 decision.

[6] The appeal had challenged the commissioner's finding on scope (as a single

ground of appeal). The court dealt with the jurisdiction issue in a decision on 21 September 2023 finding in favour of the appellant on that scope issue.[1]

Application for costs

[7] The appellant has sought an award of costs against the Council in the sum of $40,239.56 (GST inclusive). This includes the filing fee of $600 and the hearing fee of $350. The application was accompanied by invoices mainly comprising of legal costs, which the court has considered.

[8] Costs are sought on the basis that the approach of the Council to the application and ensuing appeal put the appellant to significant expense. The Council is said to have engaged in an unreasonable course of conduct in its approach to the appeal such that an award of costs against the Council is appropriate.

[9] The appellant submits a contribution of 50% of the actual costs is appropriate on the grounds that the Council's unreasonable approach to the s136 application necessitated the appeal and this is plainly a *Bielby* factor that should warrant an award of higher than usual costs.[2]

The Council's submissions

[10] Legal submissions for the Council in opposition to the costs application commence by stating that the appeal had raised five issues as set out in the memorandum for the Council and Trustees Executors Limited ('TEL') dated 20 April 2023, and in a court Minute dated 22 September 2021. In summary the issues are:

Issue 1 – the scope jurisdiction questions;

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[1] *Woolley v Marlborough District Council* [2023] NZEnvC 206.
[2] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

Issue 2 – the lapse issue;

Issue 3 – the land ownership issue;

Issue 4 – the Rangitane issue; and

Issue 5 – the water amount issue.

[11] Issues 1, 2 and 5 were raised by the Council, and these had been raised by the Council's officer reporting on the s136 application at the hearing before the commissioner. As counsel for the Council notes in his submissions, the application was declined on the jurisdictional issue. The commissioner had rejected the contention that the underling permits had lapsed. No determination was made on Issue 5.

[12] The Council's submissions note that there is convention against awarding costs against the Council where "the Council is performing a statutory function and is there to assist the Court and provide parties with confidence that its decision will be supported".[3]

[13] The Council's submissions also state that "One party to the Council hearing relied on the Council to continue to defend the decision – namely, Trustees Executors Limited".

Costs in the Environment Court

[14] Under s285 RMA, the Environment Court may order any party to pay to any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. The Environment Court Practice Note 2023 sets out guidelines in relation to costs, and the parties in this case have referred to some of them. However, the Practice Note does not create an inflexible

[3] Memorandum for Marlborough District Council in Opposition to Application for Costs by the Appellant dated 20 November 2023 at [13].

rule or practice.[4]

[15] The purpose of a costs award is not to penalise an unsuccessful party, but to compensate a successful party where that is just.[5]

[16] While the court's usual practice is not to order the primary decision-maker whose decision is the subject of the appeal, a council is not immune to a costs award if it has failed to perform its duties properly or has acted unreasonably.[6]

[17] 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 awarded.[7]

[18] In determining the quantum of costs awards, there is no scale of costs. However, where costs have been awarded, awards have tended to fall within three bands, as follows:

(a) 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");
(b) higher than standard costs, where certain aggravating factors are present; and
(c) indemnity costs, which are awarded rarely and in exceptional circumstances.

Evaluation

[19] The Council's submission at [11] is broadly correct. However, the

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[4] *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 (HC) at [21].
[5] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
[6] The Environment Court Practice Note 2023, cl 10.7(d).
[7] *Re Queenstown Airport Corporation Ltd* [2019] NZEnvC 37.

commissioner had determined that the underlying take and use permit had not lapsed. Accordingly, the Council was intending to defend the refusal to grant the application for reasons extending beyond those that had been the reason for a decision to decline.

[20] TEL was not a submitter to the original application, although it joined the appeal under s274. However, TEL's s274 party notice raised grounds in opposition to the application extending beyond the reasons for the commissioner's decision to decline. The Council was under no obligation to defend the decision on grounds raised by TEL.

[21] By the time of the hearing on the jurisdiction issue, the court was advised that scope was the single remaining issue to resolve at the hearing, as the remaining four issues were not being pursued.

[22] As is apparent in the court's decision on the scope issue, the court did not agree with the legal argument raised by the Council in defence of the commissioner's decision on that point.

[23] The court's decision notes that there had been previous transfers of the water use permit where the water was to be used for viticulture granted between 2010 and the commissioner's decision to decline.[8] The scope issue had not been raised before that.

[24] As counsel for the Council notes in his submissions, the Council treated the issue as one of interpretation and sought to defend the decision on that basis. However, that was a very fine distinction. While that approach avoided having to address the fact that the Council was *functus officio* in relation to the decision to grant the underlying permits, the argument had little merit given the express terms of the underlying permits.

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[8] [2023] NZEnvC 206.

[25] As this was a jurisdictional issue, the Council was not under any obligation to support the commissioner's decision. Having decided to support the commissioner's decision, the Council exposed itself to the risk of an award of costs in the event that its argument was not accepted.

[26] The Council's submissions were critical of the fact that the attendances itemised in the invoices attached to the application are attributable to the actions of s274 parties and not the Council. While that is potentially a valid complaint to raise in response to the application, two of the parties withdrew from proceedings at an early stage. Moreover, as counsel's submissions acknowledge, the Council's stance on the appeal was influenced by the position of TEL on the appeal.

[27] Accordingly, this factor is not sufficient reason for rejecting the application for costs.

[28] Counsel further queries how costs associated with an appeal on the second application have been addressed. However, on the court's inspection of attendances itemised in each of the invoices attached to the application, there is no mention of attendances associated with that appeal.

[29] Finally, I comment on the Council's position that the scope issue was a preliminary issue and that it would be unusual to award costs against the hearing in relation to a hearing on a preliminary issue.

[30] Scope may have initially been a preliminary issue when all five of the issues were live issues to be determined by the court. However, by the time of the hearing, scope was the single remaining issue to be determined in resolving the appeal. The parties agreed on the conditions to be imposed on the water use permit resulting from the s136 application, with the result that there was no requirement for a further hearing in the court.

[31] In all circumstances I am not prepared to grant an award on the basis that there are factors warranting an uplift as sought in the application, as I doubt there

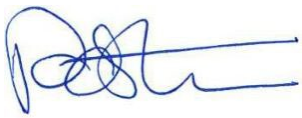
are factors associated with the Council's conduct that warrant that in the circumstances, although, I consider that the appellant is entitled to recover some of the costs it has incurred.

Quantum

[32] An award of $18,000 is warranted in this case. This sum amounts to approximately 25% of the costs incurred by the appellant, excluding the costs itemised in the 26 May 2021 invoice, as these are for attendances at mediation.

[33] I find that the attendances otherwise itemised in the appellant's invoices are fairly related to the Council's position in response to the appeal.

[34] Under s285 RMA, the Council is ordered to pay the appellant the sum of $18,00.00.



P A Steven
Environment Judge