IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2021] NZEnvC 015

IN THE MATTER OF	an appeal under s129 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ**)
AND	of Part 11 of the Resource Management Act 1991 (**RMA**)
BETWEEN	BW OFFSHORE SINGAPORE PTE LTD
AND	VIJAYENDRAN MAHINDRAN
	(ENV-2020-AKL-000025)
	Appellants
AND	THE ENVIRONMENTAL PROTECTION AUTHORITY
	Respondent

Court:	Judge J A Smith
Hearing:	In chambers at Auckland
Last case event:	10 December 2020
Date of Decision:	26 February 2021
Date of Issue:	26 February 2021

DECISION AS TO COSTS

A: Under s285, RMA, the Environmental Protection Authority is ordered to pay

to BW Offshore Singapore Pte. Ltd costs of $110,000.00.

B: Under s286, RMA, this order may be filed in the District Court at New Plymouth for enforcement purposes (if necessary).

REASONS

Introduction

[1] This proceeding concerns an appeal against abatement notices AN003, AN004, AN005 and AN006 issued by the Environmental Protection Authority (**EPA**) against the appellants, collectively known as **BW Offshore**.

[2] BW Offshore sought to remove their vessel from the Tui oil field in accordance with a 2017 Ruling of the EPA. In early 2020, the EPA advised BW Offshore that they could not rely on the 2017 Ruling and abatement notices were subsequently issued.

[3] An application to stay the abatement notices was made by BW Offshore and granted in the Environment Court in March 2020. There was a subsequent appeal, and also a further application for stay or injunction of the Environment Court decision, filed in the High Court by the EPA. On 7 April 2020 the High Court issued a decision granting the stay sought by the EPA, the effect was that the abatement notices issued by the EPA remained in effect.

[4] Subsequently the Environment Court concluded to determine the Appeal, as sought by the parties. After a 2-day hearing the Environment Court issued a decision on 21 October 2020 concluding that the abatement notices should be cancelled.

[5] On 19 November 2020, BW Offshore made an application for costs against the EPA. This application is a determination on the papers.

BW Offshore position

[6] BW Offshore seek costs for both the substantive appeal and the stay

application before the Environment Court.

[7] BW Offshore advise that the legal costs they incurred in Environment Court proceedings in relation to the appeal of the abatement notices and application for stay total $294,406.00. BW Offshore submit that an award of costs on an indemnity basis is appropriate in the circumstances. BW Offshore submit that in that event that the Court does not accept that full indemnity costs are warranted, that near indemnity costs i.e. 80% of BW Offshore's costs, would be warranted.

[8] BW Offshore seek an award of higher than usual costs or indemnity costs against the EPA for the following reasons:

a) The basis of the abatement notices was unmeritorious and without substance.

b) The EPA acted unreasonably and failed to use other appropriate avenues to resolve the differences in opinion as to the applicability of the 2017 Ruling. The abatement notices should never have been issued and (without resiling from that primary submission) the abatement notices should have been cancelled before the hearing.

c) The EPA pursued unmeritorious arguments and failed.

d) The EPA did not file any expert evidence to support its arguments, in circumstances where it would reasonably have been expected to do so if there had been a proper basis for the abatement notices.

e) In addition to the costs of the legal proceedings that are the subject of this costs application, complying with the abatement notices has cost the Appellant approximately $22.7 million (USD) of wasted expenditure; indemnity costs are reasonable relative to the far greater costs that the Appellant has incurred as a direct consequence of the EPA's decision to issue the abatement notices.

EPA position

[9] The EPA submit that no order for costs should be made against the EPA as a

regulatory consent authority which has performed it duties properly and acted reasonably, and the appeal arose out of a genuine dispute about legal rights – the effect of the 2017 Ruling – which was in the interests of the parties to resolve.

[10] The EPA submit that if the Court exercises its discretion to order costs in favour of BW Offshore, the appropriate category is standard costs at 25% of reasonable actual legal costs for a single-issue appeal involving a 2-day hearing. The EPA submit a higher costs category is not appropriate having regard to the way BW Offshore conducted its appeal.

[11] The EPA submit that exceptional bad conduct is required to be established before ordering indemnity costs and is not present in this appeal.

[12] The EPA submit that if the Court exercises its discretion to order costs in favour of BW Offshore, no allowance should be made in BW Offshore's favour for the interim stay application, as the EPA was the successful party in that application, following reversal of that stay by the High Court.

[13] The EPA applies for an order for standard costs or an allowance reducing any costs ordered against EPA in favour of BW Offshore, as the EPA submit that they were the successful party on the stay application. The EPA seeks an order for costs in its favour or an allowance/reduction of $11,011.57 including GST, being 33% of actual costs incurred.

[14] The EPA seeks an order for standard costs for the cost of responding to BW Offshore's costs application, being the higher 33% rate of actual costs. The EPA submit that BW Offshore's formal costs application was potentially unnecessary and avoidable, and BW Offshore did not meaningfully engage with EPA's exploration of agreement on all outstanding issues in the Environment Court and in the High Court.

Application for costs in relation to stay

[15] I will not be considering the applications for costs in relation to the stay

application before the Environment Court in this decision because the application for stay was decided on a different basis and is a separate procedure commenced and supported by different affidavits. I also note for completeness that any costs in relation to the High Court proceedings are beyond the jurisdiction of this Court.

[16] The focus of this decision will be BW Offshore's application for costs in relation to the substantive appeal. I will also consider the EPA's application for costs for responding to BW Offshore's costs application.

Section 285 RMA and related principles

[17] Under s285 RMA, the Court may order any party to proceedings before it to pay to any other party the costs and expenses incurred by the other party that the Court considers reasonable. That is a broad discretion. The Court is guided by a body of general principles developed through case law and summarised in the Court's Practice Note.

[18] As with the exercise of any judicial discretion, applications for costs are to be dealt with in a principled manner with no presumption that costs will follow a successful outcome. That said, costs are more likely awarded in enforcement proceedings because the respondent has no choice about becoming involved.

[19] In determining any costs application, the Court must first consider whether a costs award is justified. If a costs award is found to be appropriate in all the circumstances, then the next issue to be determined is the amount.

[20] Costs' awarded in the Environment Court tend to fall into three broad categories:

a) Standard costs, which generally result in awards between 25-33% of costs actually incurred;
b) Higher than normal costs, where particular aggravating or adverse factors

might be present such as those identified in *Bielby*[1]; and

c) Indemnity costs, which are within the Court's jurisdiction to award, but which are awarded only rarely, in exceptional circumstances.

[21] The decision in *DFC NZ Limited v Bielby* outlined five factors that may be taken into account when awarding higher than standard costs:

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.

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 of defence.

Ordering costs against a decision maker

[22] When considering an award of costs against consent authorities, there is a well-recognised reluctance (reflected in paragraph 6.6(c) of the Court's Practice Note) to make costs awards against public bodies, unless they have failed to perform their duties properly or have acted unreasonably. To the extent the EPA argue that there must be exceptional bad conduct we reject that submission as without authority.

[23] The EPA submit that it is in the public interest that the EPA as the relevant decision maker which participated in the appeal, should not be responsible for costs, which would then ultimately be borne by the public. The EPA contend that although the Court came to a different conclusion as to the interpretation of the 2017 Ruling, the EPA had discharged their statutory obligation properly and lawfully and acted reasonably.

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[1] *DFC NZ Limited v Bielby* [1991] 1 NZLR 587.

[24] *Emma Jane Ltd v Christchurch City Council*[2] establishes the "threshold of blameworthiness" test to the effect that the Court will not order costs against the first instance decision maker/consent authority unless its actions were in some way blameworthy. As I discuss there are matters in this case that satisfy me that the threshold is overcome in this case:

a) Section 6.6(c) of the Environment Court Practice note contemplates that costs may be awarded against a public body decision-maker where the decision appealed against would have imposed an unusual restriction upon the Appellant's rights and the restriction was not upheld. In the decision the Court discuss the fact that decisions under section 162(2) of the EEZ Act have significant consequences in restraining the vessel from activities within the EEZ area.

b) Rulings create a level of certainty for operators, and there is a legitimate expectation by companies that the ruling will endure unless there is a clear reason for departure.

c) As noted in the decision it appears to be common ground that disconnection from anchor cables and the like is permitted, and thus it is only the abatement notices that prevented the FPSO from disconnecting and sailing away from the Tui Field. It is for these reasons that I consider the abatement notices imposed an unusual restriction on BW Offshore, and with cancellation of the abatement notices this restriction was not upheld.

d) The EPA's case demonstrated a narrow focus, the EPA did not adapt to the changes that occurred between issuing of the abatement notices and the hearing. In particular detailed evidence as to the security of the field was provided to the EPA well before this hearing.

e) In *Aitchison v Wellington City Council*[3] the High Court held that in cases where a council appears as a neutral party, costs may not be appropriate. I accept the

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[2] *Emma Jane Ltd v Christchurch City Council* NZEnvC 020/2009, 2 April 2009.

[3] *Aitchison v Wellington City Council* [2018] NZHC 1674.

submission that the EPA did not take a neutral approach, the EPA took an active role in the proceedings. Although not essential to this case I note the general tenor of the EPA case was that they were the controlling authority and the decision was therefore not reviewable by this Court. This is discussed at paragraph [14] were Mr Carter submitted there was no power of appeal for a section 162 ruling.

[25] I consider that the EPA did not fulfil its role properly. No experts were called by the EPA, and the Profac report relied on by the EPA had not been reviewed in light of expert evidence from BW Offshore. As noted in the Court's decision there was no evidence advanced, either in the abatement notices or any time prior or since, that there are effects from the disconnection that are more than minor, or that the change in circumstances suggested by the EPA vitiate the 2017 Ruling.

[26] I am satisfied that in the circumstances of this proceeding the presumption against costs does not arise. I consider an award of costs against the EPA is possible.

Factors that warrant an award of costs

[27] I will not lengthen this judgement by setting out the written submissions of the parties. I will endeavour to address the key propositions advanced by the parties in the course of providing my reasons for my decision.

[28] I accept the EPA's submission that it is the conduct in this proceeding that is relevant to determining an award of costs. The basis on which the EPA issued the abatement notices and their purpose in issuing the abatement notices was not a live issue in the substantive hearing, the focus of the substantive hearing was the nature of the changed circumstances and their effect (if any) on the 2017 Ruling.

[29] In the course of the substantive hearing the EPA continued to address matters that were resolved. The focus of the appeal hearing was the nature of the changed circumstances and their effect (if any) on the 2017 Ruling. Despite there being significant changes since the time that the abatement notices were issued that counted

heavily against the continuation of the abatement notices the EPA did not change their position, and in the appeal hearing continued to run an argument that the change in circumstances persisted. The EPA also did not exercise their power to cancel the abatement notices.

[30] From at least May 2020 onwards it was known that non-flushing of the line will have no more than minor impact on the environment on the EPA's own assessment; and the decommissioning of the Field is to be handled by MBIE.

[31] There was a concern in the Petrofac Report, relied upon by the EPA, that some of the wellhead valves were not sealing against wellhead pressure, and that dual barriers were not in place. In early April 2020 information was provided to the EPA by BW Offshore which removed most of the doubt as to the current security of the Field. It appears this information was not considered by Petrofac, the Petrofac report relied on by the EPA was not modified.

[32] That the matters discussed above were no longer material prior to the substantive hearing, suggests that the EPA failed to explore earlier settlement opportunities.

[33] Notwithstanding that this matter was to be set down for a full hearing, the EPA did not call expert witnesses to support contentions of risk to the oil field, environmental damage because of not flushing the pipes, and the like. The EPA chose to rely on a Petrofac Report, but no witnesses for Petrofac gave evidence. As noted in the Court's decision there was no evidence advanced, either in the abatement notices or any time prior or since, that there are effects from the disconnection that are more than minor, or that the change is circumstances suggested by the EPA vitiate the 2017 Ruling. The EPA did not file any expert evidence to support its position where it would reasonably have been expected to do so. The arguments which were advanced had no expert support.

[34] This Court commented in its decision that Mr Carter's submission in relation to section 162 of the EEZ Act was curious, as there was no suggestion that the Court

would make any ruling under section 162 of the EEZ Act. The only conclusion I can draw for the submission is an argument that such ruling were not susceptible to Environment Court review.

[35] In the appeal decision I expressed my dismay at the state of the parties' document bundle presented for the hearing. Documents were replicated, many pages were unhelpful and confusing, with numerous references to various copies of the same documents. I consider this went some way to lengthening the time spent on this appeal as the Court spent considerable time reading the material. Despite criticisms by both the Environment Court and High Court no attempt was made to shorten the documents. I had to spend time at the beginning of the hearing of the appeal discussing the necessary focus of the hearing. This is a factor to be taken into account as a factor warranting costs, only in a minor way as I was critical of both parties in relation to the volume of material provided.

[36] BW Offshore point to the fact that in their closing submissions, the EPA appeared to have taken a technical legal argument that the Court did not have jurisdiction to consider environmental effects, and that the EEZ Act gave this jurisdiction to the EPA alone. It was agreed at the substantive hearing that the Court would apply Part 11 of the RMA, and from this it was concluded that the Court will have powers from the RMA, including consideration of the matters under the EEZ Act, together with the same discretions and powers the Court would normally have under appeal. The purpose of the EEZ Act provisions, particularly section 162(2) and section 20, is to avoid adverse effects on the environment. The purpose of the abatement notice is focussed around adverse effects on the environment or the existing interests. The Court in deciding this matter therefore had to consider environmental effects. The Court found that on the evidence before it, there is no more than a minor (or less than minor) impact upon the environment from the disconnection occurring.

[37] BW Offshore's operation costs are not relevant to the determination of whether or not to order to costs, and the amount. The consideration of costs does not address the consequences of the decision, the costs decision only looks at the legal

costs incurred in the course of the proceedings.

[38] Finally, I want to note that through the period for the initial stay application to the hearing of this appeal the responsibility for deconstruction of the Tui Field fell to the Government, in particular MBIE. Their website made it clear that the first priority was to disconnect the FPSO. Thus, two government departments became engaged in discussions over the Tui Field at continuing costs to the ratepayer. The failure to resolve the issue prior to the hearing makes it clear that costs against the government cold have been considered by a whole government approach.

[39] I accept that BW Offshore went to some lengths to try and avoid proceedings and was ultimately left with no option but to appeal. On that basis, I also consider some recompense of costs is appropriate in this case.

Are there Bielby factors present?

[40] Overall the Court agrees and accepts the submissions of BW Offshore that there were *Bielby* factors present in this case that warrant an award of costs.

[41] I find that the arguments the EPA advanced were unmeritorious, the EPA's case was poorly presented with no expert evidence, the way it was pursued even when MBIE sought disconnection put BW Offshore to unnecessary cost, and the EPA failed to explore the possibility of resolution when that was clearly the expectation of all involved.

Quantum of costs

[42] The consideration under section 258(1) RMA of the costs that the Court considers reasonable requires a starting point assessment of whether the actual costs said to be incurred are reasonable.

[43] The EPA dispute the reasonableness of costs incurred by BW Offshore. The EPA submit that the actual legal costs of almost $300,000.00 for a single-issue

abatement notice appeal involving a 2-day hearing is not a reasonable starting point. The EPA submit that BW Offshore's actual legal costs are extremely high and not particularised. The EPA draw attention to the fact that the costs claimed by BW Offshore are well beyond other comparators, such as the High Court scale. The EPA suggest a more reasonable starting point of approximately $90,000.00 to $100,000.00 including gst may be an appropriate allowance for reasonable and actual legal costs.

[44] BW Offshore submit that the High Court costs scale is neither applicable nor a useful guide in these proceedings. BW Offshore have advised that the costs were based on actual hours worked at standard commercial rates and are reasonable given what was at stake and the importance of these proceedings to BW Offshore. In their reply submissions, BW Offshore provided an update setting out the date ranges of the work carried out, and number of hours worked by each author level for each month.

[45] Unlike in other Courts, there is no costs scale that applies in the Environment Court. I do not consider comparison to the High Court costs scale provide a meaningful guide when attempting to assess the reasonableness of BW Offshore's costs, particularly in this case as BW Offshore were effectively forced to participate by nature of the proceedings, and had to conduct their own analysis of the 2017 Ruling to demonstrate that abatement notices should be cancelled.

[46] The total costs were high. Having viewed the invoices and schedule of legal costs provided by BW Offshore, I am willing to accept the costs incurred by BW Offshore are reasonable. This was a complex matter, highly technical, a novel issue, and there were large volumes of material. I see no basis for adopting a starting point that is different from the actual legal costs incurred.

Starting point

[47] As I will not be considering costs in relation to the stay application, I will only be considering those costs incurred after 7 April 2020, being the date the High Court made a decision on the application for stay or injunction of the Environment Court

decision. If I deduct the costs incurred by BW Offshore in March 2020, that leaves $213,410.00 in costs as a starting point.

[48] I accept that BW Offshore will have incurred some legal costs in relation to the substantive appeal prior to this date. As it will be difficult to separate these matters out, I have taken this into account in setting the quantum.

[49] I also accept that BW Offshore went to some considerable lengths to try to resolve the issue short of a hearing. As MBIE became more involved the prospect of resolution would have seemed inevitable. Those costs are therefore directly relevant to the case.

Outcome

[50] The next question then is what is a reasonable contribution – comfort level? Above comfort level? Or indemnity costs?

[51] Indemnity costs are only ordered in exceptional circumstances; for example, a breach of confidence or flagrant misconduct[4]. I do not consider the conduct of the EPA to have met this threshold.

[52] While not justifying indemnity costs, I consider a higher than normal payment is justified having identified a number of *Bielby* factors. I consider an award of just over 50 per cent is reasonable and appropriate in the circumstances. In this regard the change in circumstances after May 2020 and the further evidence of BW Offshore must be seen as significant.

[53] I make an award of costs of $110,000.00 in favour of BW Offshore.

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[4] *McGechan on Procedure* HR14.6.03(1)(A) citing *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400, (2009) 19 PRNZ 385 (CA) at [27]-[28].

Costs in relation to responding to BW Offshore's costs application

[54] The EPA seeks an order for standard costs for the costs of responding to BW Offshore's costs application, being the higher 33% rate of actual costs.

[55] The EPA submit that BW Offshore's formal costs application was potentially unnecessary and avoidable, and BW Offshore did not meaningfully engage with the EPA's exploration of agreement on all outstanding costs issues in this Court and in the High Court.

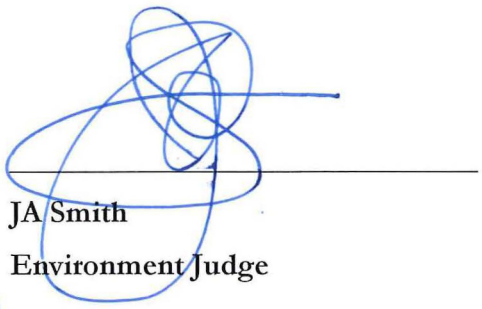
[56] BW Offshore oppose such an order. BW Offshore submit that no agreement was possible or likely as the parties' positions are too far apart.

[57] Based on the information provided I cannot conclude that BW Offshore failed to meaningfully engage and explore settlement options. I do not consider that BW Offshore, in applying for costs, have displayed conduct warranting an award of costs in favour of the EPA. For those reasons, I decline to make an order in favour of the EPA for the costs of responding to BW Offshore's costs application.

Decision

[58] I make an award of costs in relation to the appeal against the Abatement notice proceedings of $110,000.00 in favour of BW Offshore, including costs on this application.

For the Court:



JA Smith
Environment Judge