IN THE ENVIRONMENT COURT
AT WELLINGTON

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

Decision No. [2021] NZEnvC 101

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	D GOODWIN, F CLOSE, P OLVER and C HORROCKS
	(ENV-2020-WLG-000007)
	Appellants
AND	WELLINGTON CITY COUNCIL
	Respondent
AND	WELLINGTON ZIPLINE ADVENTURES LIMITED
	Applicant

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing:	On the papers in Wellington
Last case event:	Conditions decision issued 11 March 2021.
Date of Decision:	15 July 2021
Date of Issue:	15 July 2021

DECISION OF THE ENVIRONMENT COURT
AS TO COSTS

A: Costs awarded

REASONS

Introduction

[1] On 17 February 2021 this Court issued an interim decision[1] (the Decision) on an appeal filed by D Goodwin, F Close, P Olver and C Horrocks (the Appellants) against a Decision of Wellington City Council (the Council) granting Wellington Zipline Adventures Limited (WZAL) land use consent to construct, maintain and operate a zipline at 50 Landfill Road, Owhiro Bay, Wellington (the Site).

[2] WZAL's application constituted a discretionary activity under the Council's operative District Plan (the District Plan). The Appellants were submitters in opposition to the application. Their appeal was declined. Costs were reserved. The Decision required the Council and WZAL to reach agreement on certain conditions which would be included in any grant of consent. Consent in final form with approved conditions issued on 11 March 2021.

[3] WZAL has made a costs application against the Appellants. The Council does not seek costs.

Background

[4] The zipline proposal is described in considerable detail in the Decision. Briefly, ziplines are recreational devices comprising a pulley suspended on a cable mounted by platforms and poles on a slope. Persons attached to the pulley by a harness are propelled by gravity from the top to the bottom of the cable. WZAL sought to establish four ziplines on the Site ranging in length from 180 to 580 m. Zipline customers would be picked up in the central city and transported to the Site by mini bus. A maximum of 12 customers, plus two guides would use the zipline at any one time. Hours of operation would be from 9 am to 8 pm in the summer and 9 am to 4.30 pm in the winter period. It was anticipated that there would be an average of ten groups of users per day. The number of days of operation over a year would vary depending on weather conditions and possible closure of the zipline during some winter months.

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1 *Goodwin v Wellington City Council* [2021] NZEnvC 9.

[5] The Site is within a large parcel of land owned by the Council and managed under its Reserves Act Outer Green Belt Management Plan (OGBMP). The City landfill is situated within the Site which is otherwise used for a variety of recreational purposes including walking, running and cycling.

[6] The structures involved in the proposed zipline are a series of poles supporting the zipline cables together with take-off and landing platforms at the commencement or termination of each zipline. It was the common view of the landscape advisers for the Appellants and WZAL that the zipline structures themselves were not of concern in terms of their effects on landscape values of the Site. The matter which the Appellants' landscape adviser (Ms J A Williams) identified as being of particular concern to the Appellants was a contended adverse effect on visual amenity brought about by the visible movement of zipline users across the Site.

[7] The Site is zoned Open Space B under the District Plan. The planning witnesses (Mr T Anderson for WZAL and Mr P N Thomas for the Appellants) agreed that the proposal required consent as a discretionary activity because the proposed platform structures exceeded permitted activity standards. The zipline activity itself (considered in isolation) would be permitted as a recreation activity was it not for the non-compliance of the platforms and the fact that operation of the zipline would exceed a permitted noise limit at the conceptual boundary of the zipline activity (within the Site – 20m from the zipline and platforms).

[8] The planners agreed that the OGBMP was a document to which regard should be had in our considerations. This document specifically contemplated that there might be a zipline on the Site.

[9] Resolution of the appeal came down to findings on five issues, namely:

Issue 1 -

- *Would the proposal cause adverse effects on the visual amenity of the residents at 280 and 320 Hawkins Hill Road (being the Appellants) to a degree which warranted decline of consent?*

Issue 2 -

- *Would the proposal cause adverse noise effects for the residents of 280 and 320 Hawkins Hill Road to a degree which warranted decline of consent?*

Issue 3 –

- *Would the proposal cause adverse effects on the rural-residential visual amenity of the residents of 280 and 320 Hawkins Hill Road arising from a combination of visual amenity and noise effects to a degree which warranted decline of consent?*

Issue 4 -

- *Would the adverse visual amenity and noise effects of the proposal on the residents of 280 and 320 Hawkins Hill Road be avoided by shifting the location of Platform 4B?*

Issue 5 –

- *A legal issue.*

[10] The Court made the following findings on Issue 1:

> [55] Nothing in the evidence we heard even remotely began to establish the factual basis on which it was contended that the sight of persons intermittently recreating on the zipline in public space intended to be used for recreational purposes might be perceived as an adverse effect. We understand from the landscape witnesses' evidence that there would be no adverse effects on landscape values from the zipline structures which would detract from the Appellants' amenity. The issue was one of visible movement from which the Appellants sought to be protected due to a perception of intrusion. Specifically, the Appellants had previously expressed concerns about views from a home office at 280 Hawkins Hill Road which overlooks much of the Site. The house at 280 Hawkins Hill Road is nearly 300m away from Platform 4B which is situated 30m plus below the level of the house.
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> [56] We appreciate that the movement of persons using the zipline will be visible to residents of the houses but nothing in the evidence we heard identified any adverse effects of that fairly distant visibility (200m - 300m at the closest points to each of the houses) other than a contended perception of intrusion. We heard no evidence from any of the Appellants as to factors peculiar to themselves, their residential or visual amenity, their properties or the relationship

of their properties to the Site which might give rise to such perceptions. We accept that installation and use of the zipline will constitute a change to the Site but change of itself is not an adverse effect.

[57] We struggle to find any adverse effects at all on the Appellants' visual amenity arising out of views of the zipline activity. If there are such adverse effects which go beyond contended perceptions they are minor in the extreme. We find that the evidence does not support consent being declined on the basis of the adverse effects of the project on the visual amenity of the residents at 280 and 320 Hawkins Hill Road. Our finding therefore is that the answer to the question we have framed for Issue 1 is "no".

[11] The Court made the following findings on Issue 2:

[70] The predicted exceedance of the District Plan noise limit from the zipline operations at the conceptual boundary of the Site and the corresponding limit set in the conditions at the first instance hearing was not the subject of debate before us in terms of contended effects on the Appellants. We take that no further in this current context although we will return to it when considering "public" effects under the notification topic.

[71] The experts agreed that the predicted noise levels from the operation of the zipline will comply with the District Plan noise limits at the conceptual boundary of any dwelling not on the Site. With the building envelope for 280 Hawkins Hill Road attenuating the outdoor noise by around 35dB to 40dB, the noise of talking, raised voices or even loud shouting from Platform 4B would be inaudible in the office at this address.

[72] In addition to compliance with the Plan limits for noise at the conceptual boundary of any dwelling, we accept Mr Styles' evidence on the reasonableness of the noise in the context of s 16 RMA. Noise generated by the activity will comply with District plan standards and be heard during daylight hours. Mr Styles restricted his consideration to acoustic related factors only as opposed to Mr Lloyd who sought to introduce a visual component to justify his assessment that the noise would be unreasonable. We address the combination of noise and visual amenity under Issue 3 below.

[73] Having evaluated all of the acoustic evidence as well as Mr Robinson's

legal submission on this topic, as we did with contended visual effects, we struggle to find any adverse noise effects of the zipline on the Appellants and certainly no adverse effects which might be described as anything other than minor in the extreme. Our finding is that there are no acoustic grounds which would justify decline of consent for the proposal.

[74] The answer to the question we have framed for Issue 2 is also "no".

[12] The Court made the following findings on Issue 3:

[77] We conclude that the contended adverse cumulative effects on visual amenity and noise of the zipline operation, even when considered together, would be no more than minor to the extent that they are adverse at all and would not warrant decline of consent. Accordingly, the answer to the question we have framed on Issue 3 is also "no".

[13] The Court made the following finding on Issue 4:

[92] In any event, returning to our findings on effects in Issues 1 – 3, we find no adverse effects of WZAL's proposal which require to be avoided, remedied or mitigated by relocating Platform 4B. Taken overall on the basis of comparing the merits of the two options before us, we can find no substantive reason to relocate Platform 4B as requested by the Appellants and accept the views expressed by Mr Ratahi for preferring his proposed location of the platform.

[93] Our finding on this request under Issue 4 is therefore "no".

[14] The legal issue arose because the Appellants contended that the WZAL applications should have been publicly notified rather than subject to the limited notification process under which the Appellants as nearby residents had been notified. They contended that the zipline operation would be likely to have more than minor adverse effects on the wider public (ie wider than just the Appellants) for whose benefit the Council managed the Site and/or that the subject matter of the application, its policy and its context combined to create special circumstances that warranted public notification.

[15] The Court relevantly made the following findings with regard to these contentions:

> [124] For all of the above reasons, we determine that:
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> - The zipline will not have any adverse effects on the environment that are more than minor;
> - There are no special circumstances which warrant the zipline application being publicly notified.
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> Accordingly there was no need for the application to be publicly notified.

[16] Finally, I refer to the finding contained in paragraph [129] of the Decision:

> [129] Having regard to all of those matters we determine to decline the appeal. The evidence which we heard overwhelmingly supports the grant of consent.

WZAL's Costs Application

[17] WZAL applied for costs against the Appellants on the basis that:

- The Appellants appealed on a wide-ranging (scattergun) basis and only belatedly refined the issues ultimately pursued at hearing, so as to put WZAL to unnecessary expense;
- The Appellants advanced arguments that were found by the Court to be without substance on the facts;
- The Appellants advanced a technical argument (as to notification) without establishing the facts necessary to pursue the argument (or getting close to doing so).

[18] The Appellants sought an indemnity award of $9,399.84 (exclusive of GST) for the costs of its traffic expert who was not required to give evidence at the hearing and 50 per cent of its other costs being $35,000 (rounded and GST excluded) for its remaining costs, a total (rounded) figure of $44,400.

[19] WZAL's submission referred to the various findings made above. Mr Robinson also noted that the Appellants were unsuccessful in relation to points where they had

sought to persuade the Court that a different wording of conditions from that proffered by WZAL should be preferred. He submitted that the case fell squarely within the first *Bielby* limb, namely that the arguments advanced by the Appellants were without substance.

[20] Mr Robinson addressed the non-notification point in these terms:

> 17. The nature of the notification argument also needs to be acknowledged. It is almost by definition, a technical point. The Appellants were not arguing from a broader public interest perspective when they sought to rely on the Council's failure to publicly notify the application by reason of effects on parties other than themselves. They were seeking to use that avenue to stave off the zipline and thereby avoid the adverse effects they perceived it would have on them. It was incumbent on them to present evidence demonstrating any broader adverse effects and the Court's findings, as above, confirm their complete failure to do so.

[21] Mr Robinson colloquially described the Appellants' case on the merits as a NIMBY case (not in my backyard). He contended that the Appellants failed to present a cogent factual case of material adverse effects on them.

[22] Insofar as specific costs are concerned, Mr Robinson noted that in terms of traffic effects, the Appellants advised by Memorandum of 29 May 2020 that all issues raised in their notice of appeal (including traffic matters) remained alive and accordingly it was necessary for WZAL to brief expert traffic evidence. The Court issued a Minute on this matter on 11 September 2020 querying the need to call traffic evidence so it was still alive less than one month out from the hearing. Ultimately, the traffic witnesses provided a joint witness statement which Mr Robinson described as "not materially differing from the position set out in Mr de Kock's evidence".[2]

[23] WZAL contended that on that basis it was appropriate that there be full reimbursement of traffic witness expenses.

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2 Submission at [9].

[24] Mr Robinson submitted that the circumstances set out in the submission justified a higher costs award than the "comfort level" of 25-33 per cent and sought an award of 50 per cent of remaining costs.

The Appellants' Response

[25] The Appellants opposed the costs application and contended that there was no justification for departing from the Court's normal comfort level costs award of 25-33 per cent. They challenged an invoice of 30 June 2020 received from WZAL's acoustics advisor (Styles Group) which they contended was in respect of the Council hearing rather than Environment Court hearing and therefore did not relate to the actual and reasonable costs of the appeal. The Appellants raised a number of matters directly in response to the merits of WZAL's costs application.

[26] Firstly, they disputed that WZAL was put to unnecessary expense on the basis that the appeal was pursued on a scattergun basis and only belatedly refined.

[27] The Appellants submitted that the contention that they advanced arguments that were without substance on the facts involved some subtlety. They referred to the Court's conclusion (in summary) that the levels of adverse effects in respect to the core matters (landscape/visual amenity, noise and the combination of those two) was so low that they warranted no change to the grant of consent or conditions of consent. The Appellants contended that finding does not signify that the position taken by them on those matters was without substance as they obtained and relied upon the advice of highly regarded experts regarding these issues and ran their case accordingly. They noted that on the matter of visual amenity issues, the Court ultimately determined the matter contrary to the evidence of both landscape experts, including WZAL's own landscape witness. For these reasons they contended that it was overly simplistic to state that the positions adopted by them on these matters were without substance. They went on to identify a number of aspects where they contended they were successful in terms of wording of conditions.

[28] The Appellants referred to WZAL's contention that the public notification argument pursued by the Appellants was technical and unsupported by evidence.

They contended that the notification argument was supported by the evidence of their landscape and planning witnesses, although the Court preferred the evidence of others. They went on to contend that the special circumstances warranting notification argument was supported by the evidence of Mr Thomas and arose from the Council's own policy regarding notification of commercial activities in accordance with the OGBMP.

[29] The Appellants contended that they were not NIMBYs as they did not oppose the project outright but rather sought the relocation of landing Platform 4B on the basis that this would allow the activity to proceed while mitigating the effects on the Appellants.

[30] In terms of quantum, the Appellants largely accepted the figures advanced by the Respondents, except the first invoice from Styles Group. The Appellants concluded their submissions in response with the final contention:[3]

> For the reasons outlined above, it is submitted that whilst the case advanced for the Appellants did not find favour with the Court, the appeal was appropriately founded on expert evidence and conducted in a responsible manner. To award higher than 'normal' costs in such circumstances is both unwarranted and would undesirably discourage responsible litigants.

WZAL's Response

[31] WZAL filed submissions in response addressing a number of the contentions advanced by the Appellants.

[32] Mr Robinson responded to the Appellants' contentions regarding traffic issues by noting that the way in which traffic issues were pursued (until comparatively late in the proceedings) necessitated a complete re-running of the Applicant's case at first instance when it was apparent that traffic effects from the activities for which consent was sought would be minor in the extreme.

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3 Appellants submissions at [33].

[33] WZAL submitted that if the Court found the Appellants' arguments to be without substance, there was a reasonable costs case for proceeding on the basis that the arguments advanced by them were indeed without substance. Mr Robinson contended that this argument might be " ... correctly categorised as seeking to relitigate arguments that were made, but not accepted".[4]

[34] WZAL's costs reply identified that it did not assert that the Appellants' notification argument was completely unsupported by evidence but rather that ... "the evidence did not get close to establishing that the relevant effects were more than minor or that they were in fact special circumstances warranting public notification".[5] The reply submission went on to note the Appellants' initial contention in opening submissions that if its notification argument was upheld then consent must be declined and that the notice of appeal unambiguously sought that the consent application be declined.

[35] Counsel acknowledged issues raised by the Appellants as to the Styles Group invoice of 30 June 2020 and provided an amended invoice for $8,235.83 (excluding GST) clarifying that all work claimed for in this invoice related to the appeal.

Considerations and Discussions

[36] The starting point for consideration of any costs award by the Environment Court is s 285 RMA which relevantly provides as follows:

> **285 Awarding costs**
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> (1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the court considers reasonable.

[37] On its face, s 285 gives the Environment Court a very wide discretion as to the basis on which it may award costs, the test being whether the Court considers it is "reasonable" to do so.

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4 Reply submissions at [9].

5 Reply submissions at [11].

[38] Notwithstanding the wide discretion it is well recognised that in exercising its discretion the Court must not act capriciously but on a principled basis. The application of principle requires the Court to have regard to matters such as precedent set by other cases and guidance from the Court's Practice Note which seeks to achieve consistency of process in Environment Court hearings.

[39] Case law has recognised that that costs awards made by the Environment Court commonly fall into one of three bands:[6]

- Standard costs, being comfort level or zone costs – 25 per cent to 33 per cent;
- Above comfort level or higher than normal costs;
- Indemnity costs.

[40] In the leading decision of *Bielby*[7] the High Court identified a number of factors which might justify an elevated award of costs. The factors identified in *Bielby* were:

- Where an argument or arguments are advanced which are without substance;
- Where the process of the Court is abused;
- Where solicitors or counsel have failed to comply with the requirements of the Rules or an order or direction of the Court in respect of procedural matters, especially in meeting prescribed time limits;
- Where the case is poorly pleaded or presented;
- Where it becomes apparent that a party has failed to explore the possibility of settlement when a compromise could reasonably have been expected;
- Where a party takes a technical or unmeritorious point or defence, and fails.

[41] Over the course of years the *Bielby* factors have come to be applied not just in determining whether elevated costs should be awarded but whether costs should be awarded at all and, if so, at what level. These factors now overlap with paragraph

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6 *Aitchison v Wellington City Council* [2018] NZHC 1674, [2018] NZRMA 507 at [33].
7 *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

6.6(d) of the Practice Note which provides as follows:

> 6.6 **Costs**
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> The following issues are relevant to the practice of the Court in considering costs issues:
>
> (d) In considering whether to award costs, and the quantum of any award, the following factors are commonly referred to and given weight, if they are present in the particular case:
>
> (i) the arguments advanced by the party were without substance;
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> (ii) the party has not met procedural requirements or directions;
>
> (iii) the party has conducted its case in a way that unnecessarily lengthened the hearing;
>
> (iv) the party has failed to explore reasonably available options for settlement; or
>
> (v) the party has taken a technical or unmeritorious point and failed.

[42] In this instance WZAL has sought reimbursement of its traffic expert's costs in full and remaining costs at the rate of 50 per cent of costs actually incurred, being "higher than standard" costs.

[43] I commence my observations as to the specifics of the WZAL costs claim by noting that this costs application directly raises *Bielby*/paragraph 6.6(d) Practice Note matters namely:

- Arguments advanced by the Appellants were without substance;
- The Appellants took a technical or unmeritorious point and failed.

[44] Further to that, those specific arguments must be considered in the broader context that the Appellants' appeal as initially launched was on what might fairly be described as a scattergun basis, identifying no fewer than seven contended significant adverse effects on the environment which would be brought about by the proposed zipline.

[45] At a telephone conference on 4 June 2020 the Appellants formally abandoned four of those categories of contended adverse effects in that they advised that these would not be the subject of discrete statements of evidence. Three of the *abandoned*

matters (loss of vegetation, loss of character and construction effects) could not be based in any way on the Appellants' landscape evidence, suggesting that their initial approach to the appeal was opposition at all costs and abandonment only when even their own witness did not support their position on these matters.

[46] As at 4 June 2020 the Appellants continued to formally pursue the matters of noise, landscape/visual amenity and traffic effects. The traffic matter was largely abandoned as a result of the issue of a memorandum from the Court of 11 September 2020 (about one month prior to commencement of hearing) querying the need to hear evidence on traffic matters. The Court did so because it was difficult for its members to ascertain from the evidence of the traffic witnesses what was the serious issue in allowing access to the Site of about a dozen or so zipline vehicles per day on a road[8] widely used by members of the public and their vehicles. The Court accepted that it was necessary for such access to be safe, but there was nothing in the evidence that seriously suggested that would not be the case if appropriate controls were in place. The late abandonment of this point by the Appellants ought properly be reflected in terms of costs.

[47] Insofar as the remaining matters were concerned, these boiled down ultimately to a concern about visual effects of the ziplining activity (ie movement of zipline users in the air across the Site) and noise effects.

[48] Insofar as the matter of adverse effects of the zipline use are concerned, we refer to the provisions of paragraphs [55]-[57] of our Decision which we have cited in paragraph [10] (above).

[49] Notwithstanding apparent agreement from the landscape witnesses on this topic, the members of the Court were mystified as to why it should be regarded as an adverse effect for the Appellants to see people ziplining across a rural landscape intended to be used for recreational purposes who approached no closer than 200m-300m from the Appellants' houses. The Decision[9] recorded that the Court heard no

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8 The road is not dedicated legal road but land owned by the Council which it allows the public to use for access purposes.

9 Decision at [56].

evidence from any of the Appellants as to any factors peculiar to themselves or their properties which made this a problem.

[50] Insofar as the matter of noise is concerned, the noise experts agreed that the proposal would be compliant with District Plan noise limits at the Appellants' houses. The material provided by the Appellants had raised issues of noise effects in an office at 280 Hawkins Hill Road where the experts agreed that noise from the zipline activity would be inaudible. The Court struggled to find any adverse noise effects on the Appellants at all and certainly nothing which might be described as anything other than minor.

[51] When the visual amenity and noise effects were considered together, the Court again concluded that any effects would be no more than minor to the extent that they were adverse at all. Similarly the Court found that these combined adverse visual amenity and noise effects did not justify shifting Platform 4B (being the closest to the Appellants' properties at about 200m away).

[52] Mr Slyfield contended on the Appellants' behalf that the positions they adopted were reasonable because they did so on the basis of expert advice. That does not greatly assist them in the context of the findings made by the Court which were readily apparent on any objective consideration of the evidence.

[53] The evidence as to noise effects (even uncritically accepting the expert evidence from Mr Lloyd for the Appellants) did not begin to reach a point which would support a decline of consent. Although the landscape witnesses were in apparent agreement as to adverse effects from movement of zipline users across the Site, it was never adequately explained how that might be so.

[54] The technical arguments issue revolved around two matters.

[55] The first of these was a contention that the zipline would have adverse effects on the public using the Site. Evidence as to that boiled down to the view expressed by Mr Thomas that walkers/cyclists etc using recreational tracks on the property

might be "disconcerted"[10] by the sight or sound of users of the zipline which they might come across unexpectedly. He agreed that such adverse effects as there might be from this disconcerting factor could be addressed by warning signs. In reality, it seemed to the Court that there was no substance to this concern in any event.

[56] The second matter relating to notification arose out of a provision in the OGBMP which provides for consent for commercial activities involving new permanent structures on the Outer-Green Belt to be publicly notified. It was the Appellants' contention that this created special circumstances requiring notification of the Resource Management application. The Court dealt with that matter in paragraphs [121]-[123] of the Decision, rejecting that proposition. Again, the Court found there to be no substance to that proposition.

[57] The grounds on which the appeal was rejected, both as to factual merit and legal argument, were overwhelmingly in favour of WZAL. The few amendments which were made to conditions as the result of the appeal hearing were ones which might readily have been resolved by reasonable persons taking a reasonable approach during pre-hearing processes.

[58] WZAL has sought reimbursement of its traffic witness expenses in full and 50 per cent of its remaining costs. A full award in respect of the traffic expenses reflects the belated abandonment of this issue. It is something of an understatement to say that the 50 per cent claim for other costs is generous to the Appellants. Had more costs been sought, they would have been granted.

[59] The costs claim is granted as to full costs for the traffic witness expenses and 50 per cent of remaining costs, excluding GST in each case as WZAL is GST registered. The final figure to be rounded giving an end figure of $44,400.

Outcome

[60] The Appellants D Goodwin, F Close, P Olver and C Horrocks are jointly and severally ordered to pay Wellington Zipline Adventures Ltd the sum of $44,400 in

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10 NOE at page 192.

reimbursement of costs incurred in these proceedings.

[61] This costs award to be enforced if need be in the District Court at Wellington.

B P Dwyer
Environment Judge