IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2022] NZEnvC 93

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	WAIMEA PLAINS LANDSCAPE PRESERVATION SOCIETY INCORPORATED
	(ENV-2021-CHC-063)
	Appellant
AND	GORE DISTRICT COUNCIL
	Applicant Respondent
AND	SOUTHLAND REGIONAL COUNCIL
	Respondent

Court:	Environment Judge P A Steven
Hearing:	On the papers
Submissions:	D Gray for Waimea Plains Landscape Preservation Society Incorporated
	S Everleigh and J Hardman for Gore District Council
	K H Woods for Southland Regional Council
Last case event:	27 April 2022
Date of Decision:	3 June 2022
Date of Issue:	3 June 2022

DECISION OF THE ENVIRONMENT COURT

A: Under s285 of the Resource Management Act 1991, costs are awarded to the Waimea Plains Landscape Preservation Society Incorporated in the sum of $15,373.

B: Under s286 of the Resource Management Act 1991, this order is enforceable in the District Court at Gore.

REASONS

[1] Waimea Plains Landscape Preservation Society Incorporated ('the Society') appealed against a joint decision by Gore District Council ('the Council') and Southland Regional Council ('the Regional Council') to approve the application for resource consents to:

(a) construct a new single-span pedestrian and cycle bridge across the Mataura River;
(b) attach new water pipelines to the bridge linking the reticulation networks of Gore and East Gore;
(c) construct a temporary causeway; and
(d) install temporary piles in the riverbed.

[2] In the court's decision of 11 March 2022,[1] the application for resource consent was declined, and the Society's appeal upheld. The issue of costs was reserved.

[1] *Waimea Plains Landscape Preservation Society Incorporated v Gore District Council & Southland Regional Council* [2022] NZEnvC 29.

Application for costs

[3] The Society filed an application for costs with the court on 1 April 2022. It seeks an award of costs against the Council in the sum of $31,368.79. This represents 70% of its total costs incurred in pursuit of its appeal.

[4] The grounds on which it seeks costs are as follows:[2]

(a) the Council insisted that the appeal proceed to hearing as a matter of urgency, which put significant strain on the Society to comply. This was exacerbated by the COVID-19 Red Light restrictions which disrupted the Society's ability to meet deadlines and limited site visit dates;

(b) the Society spent significant time and resources, in the limited time provided, preparing for and attending various events in relation to the hearing;

(c) there were critical flaws in the Council's evidence, which were identified in the court's decision. During the course of the hearing, various issues emerged, which were considered unhelpful for the court's consideration of the matter. Moreover, the Society submits that the court addressed these issues with criticism substantively in the decision;

(d) the evidence of the Council that was put forward was often lacking and without merit. The Society notes in particular the court's criticisms of the evidence of Ms Pflüger and Ms Perkins in its decision; and

(e) the Council made last minute attempts to address the deficiencies in its evidence. The Society submits this was detrimental to them and inconsistent with correct evidential procedure.

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[2] Application for costs on behalf of the appellant, dated 1 April 2022.

[5] Mr Gray for the Society also addressed the issue of himself being a self-represented litigant lawyer. He submits that the current position regarding self-represented lawyer costs is outlined in *McGuire v Secretary for Justice,* which determined that "a litigant in person who was also a lawyer could recover costs".[3]

Response by the Council

[6] The Council filed its response to the Society's application on 19 April 2022, submitting that costs should lie where they fall. They submit the following in response:[4]

(a) the Council met all procedural directions and requirements for this matter. It was careful to conduct its case in a way that would not unnecessarily lengthen the hearing;
(b) all aspects of the Council's case were relevant to the matters to be determined by the Court. The case advanced by the Council was consistent with the case that had been successful at the first instance hearing;
(c) the approach taken by the Council, while to its detriment, did not result in the Society being put to additional cost through the need to produce additional evidence, or through lengthening of the hearing;
(d) in relation to Ms Pflüger's evidence:
    (i) her approach of assessing from representative viewpoints was consistent with that of other landscape experts who undertook assessments for the first instance hearing, and the commissioners did not identify and issue with that approach;
    (ii) the Society's evidence included Mr Gray's assessment of visual effects as a resident of the area, which appended the landscape and visual assessment by Mr Pentecost and Mr Moore from the first instance hearing; and

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[3] *McGuire v Secretary for Justice* [2018] NZSC 116 at [88].
[4] Response to application for costs, dated 19 April 2022.

(iii) while the court did not agree with the approach taken by Ms Pflüger to her assessment, the Council submits that this does not amount to a matter which should result in an uplift of any costs award.

(e) in relation to Ms Perkins' evidence, the Council submit that she had identified the omission of transport provisions from her exchanged evidence and addressed these matters with the court. It submits that this is not a matter that could be said to have put the Society to additional cost;

(f) in relation to the cross-examination of Mr Gray:

(i) it related to two particular issues raised through his earlier cross-examination of the Council's witnesses; these were not addressed in the Society's evidence;

(ii) the documents that were introduced during cross-examination formed part of the application, because they were not attached to the notice of appeal; and

(iii) the cross-examination was brief and counsel heeded the direction of the court as to the extent it would allow this line of questioning;

(g) the Council appeared in its dual capacity as both applicant and respondent in this proceeding, and thus elected to call experts it had engaged in its role as applicant, and to advance its case jointly as applicant and respondent to avoid duplication. Moreover, the Council addressed in their submissions in reply, issues identified by the court in relation to visual effects and weight applied to various district plan provisions. The Council submits that the concerns identified by the court were not matters that contributed to costs incurred by the Society.

[7] If the court is minded to make an award of costs, the Council submits that 25% of costs should be recoverable, being $10,310.48. It submits this on the basis that it considers the costs sought by the Society (namely, the costs incurred by legal

counsel at Parker Cowan Lawyers, expert witness and consultant costs) should not be reasonably attributed to the Council.

Response by the Regional Council

[8] The Regional Council also provided a response on 14 April 2022. While no costs are being sought against or by the Regional Council, it filed a memorandum out of an abundance of caution, outlining why it would not be appropriate to order it to pay costs.

[9] Given that no party has sought costs against the Regional Council, I do not consider that an award against it is appropriate. However, I have included the Regional Council's reasons for completeness.

[10] It explains that an award of costs should not be made against the Regional Council because there were no special circumstances which justify a departure from the principle that costs are not awarded against a statutory decision-maker. It submits that there is no suggestion that the Regional Council failed to perform its duties properly or acted unreasonably in this case, nor did it unnecessarily prolong the proceedings or take steps outside its public interest role as a consent authority.

Section 285 RMA and relevant principles

[11] Under s285 of the 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. This provides the court with a wide discretion,[5] however this must not be exercised inconsistently with well-established principles relating to costs.

[12] These principles have been developed through case law and are also

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[5] *Tairua Marine Ltd and Pacific Paradise Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).

recorded in the court's Practice Note.[6] However, as the court is part of a wider civil justice system, it should have regard to more general principles that have been developed by other courts than they are relevant.[7]

[13] The purpose of a costs award is not to penalise the unsuccessful parties, but to compensate successful parties where that is just.[8] This statutory discretion must, however, be exercised in a principled way.[9]

Costs against councils

[14] The well-established principle of costs against a public authority is of notable relevance here. Costs will not be awarded against a statutory decision-maker in the absence of special circumstances.[10] 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.[11]

[15] Case law has demonstrated that '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 findings, thus adding to the costs of the applicant.[12]

[16] The court has previously undertaken an assessment of "blameworthiness" when determining whether to award costs against councils.[13] However, the recent High Court decision of *Environmental Protection Authority v BW Offshore Singapore*

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6 Environment Court Practice Note, at clause 6.6.
7 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577 at [19].
8 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385, (1996) 2 ELRNZ 138.
9 *New Zealand Heavy Haulage Association Inc v Central Otago District Council* EnvC W72/2004 at [5].
10 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 at [12] (CA).
11 Practice Note 2014, at clause 6.6(c).
12 *Contact Energy Ltd v Waikato RC* [2002] NZRMA 12.
13 *Emma Jane Ltd v Christchurch City Council* NZEnvC 020/2009, 2 April 2009.

Pte Ltd determined that this may not be a relevant encapsulation of the relevant principle; rather, the Environment Court should endeavour to use its specialised jurisdiction to reflect current states of general law when determining such issues.[14]

Costs for self-represented lawyers

[17] The court has also well-established that a self-represented litigant is not entitled to recover costs other than disbursements.[15] However, an exception lies where the litigant is a self-represented lawyer. While the Court of Appeal held to overturn the exception in *Joint Action Funding v Eichelbaum*,[16] the Supreme Court in *McGuire v Secretary for Justice* more recently affirmed that a litigant in person who is also a lawyer can recover costs.[17]

Evaluation

[18] Having reviewed the submissions of parties, I consider that an award of costs to the Society is appropriate.

[19] I acknowledge the general principle that costs are not to be awarded against councils unless there are "exceptional circumstances". On this occasion, I doubt that there are such circumstances apparent here to warrant an award despite the court's finding that the Council's approach to the hearing was unhelpful. For reasons set out in the court's decision which need not be repeated, other than to note: that the court did not have the benefit of the full evidential case that had been put to the commissioners, and that there were serious deficiencies in the Council's consideration of alternatives, also referred to by the commissioners in

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[14] *Environmental Protection Authority v BW Offshore Singapore Pte Ltd*, above n 6 at [17]-[19].

[15] *Rodney DC (Re an application)* W056/94; *Re Wellington International Airport Limited* [2020] NZEnvC 42 at [13].

[16] *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249. This position was previously accepted by the Environment Court in *Jacks Point Residential No 2 Ltd v Queenstown Lakes District Council* [2019] NZEnvC 91.

[17] *McGuire v Secretary for Justice* [2018] NZSC 116 at [55].

their first instance decision.

[20] I also accept the Society's submission that the Council made last minute attempts to rectify its evidence, at the detriment of the Society. Most notably, the Council's cross examination of Mr Gray – in which it sought to produce an exhibit through him – was declined, on the basis that the Council's production was an attempt to rectify deficiencies in their evidence without providing for an opportunity for the evidence to be tested.[18]

Self-representing lawyer

[21] Another issue that has arisen in determining costs is that Mr Gray, representative and chairperson of the Society, is a partner at law firm AB Gray & Associates. Part of the quantum sought comprises of his solicitor and firm fees.

[22] As noted above, the general principle is that a self-representing litigant is not entitled to recover costs, only disbursements. However, self-representing lawyers fall into the exception as affirmed in *McGuire*. I consider Mr Gray to fall into this exception. While not acting in the capacity as an instructed lawyer, Mr Gray would have used his legal knowledge and experience to guide the Society throughout the proceeding. This, in my view, differs substantially from a lay litigant, without legal experience or training, self-representing in a court proceeding. Accordingly, I do not consider that these fees need to be displaced from the costs consideration.

[23] I therefore consider that an award of costs in favour of the Society against the Council is warranted.

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[18] *Waimea Plains Landscape Preservation Society Incorporated v Gore District Council & Southland Regional Council*, above n 1, at [56].

Quantum

[24] Having concluded that an award is appropriate, I now move to quantum. As noted above, the Society seeks $31,368.79, totalling to 70% of the total costs incurred.

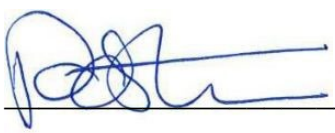
[25] I agree with the Society that the Council's conduct at times was detrimental, alongside its decision to put forward a proposal with significant adverse visual amenity effects. Moreover, the same unresolved issues at the first instance hearing were again present at the Environment Court hearing.

[26] However, in these circumstances, I am unwilling to grant a higher-than-normal award of costs on this occasion. I do not consider that the factors present warrant an award of 70%. The matter was not unnecessarily lengthened by the Council's conduct; rather, the proceeding was confined to the two days initially directed by the court. Moreover, I acknowledge that awarding a costs award of 70% against a council would impose an unnecessary burden on the local taxpayers. These factors therefore warrant a minor deduction.

Outcome

[27] I therefore conclude that an award of approximately 30% of the Society's costs is reasonable. The Council is therefore to pay the amount of $15,373 to the Society. I acknowledge this is a high amount of costs, and especially a higher quantum being ordered against a council. Nevertheless, I am satisfied that the costs incurred by the Society are reflective of the efforts they undertook to not only proceed with this matter but respond to the case put forward by the Council.

For the court



P A Steven
Environment Judge