IN THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2022] NZEnvC 122

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED
	ENV-2018-AKL-000256
	Appellant
AND	TAURANGA CITY COUNCIL
	BAY OF PLENTY REGIONAL COUNCIL
	Respondents
AND	TRANSPOWER NEW ZEALAND LIMITED
	Applicant

Court: Chief Environment Court Judge D A Kirkpatrick

Hearing: In chambers in Auckland

Last Case Event: 19 April 2022

Date of Decision: 7 July 2022

Date of Issue: 7 July 2022

DECISION OF THE ENVIRONMENT COURT ON COSTS

A: Under s 285 of the Resource Management Act 1991 the Environment Court declines the application by Tauranga Environmental Protection Society Incorporated and the trustees of the Maungatapu Marae Trust for costs against Transpower New Zealand Limited, the Tauranga City Council and the Bay of Plenty Regional Council.

B: Costs are to lie where they fall.

REASONS

Introduction

[1] The appellant, Tauranga Environmental Protection Society Incorporated (**TEPS**), together with the trustees of the Maungatapu Marae Trust (**the Trust**), a party under s274 of the RMA, seek costs in this proceeding against the applicant, Transpower New Zealand Limited (**Transpower**) and the consent authorities, the Tauranga City Council and the Bay of Plenty Regional Council (**the Councils**).

[2] TEPS appealed against a joint decision of independent commissioners for the Councils granting Transpower land use consents under the Resource Management (National Environmental Standard for Electricity Transmission Activities) Regulations 2009 and land use consents and coastal permits under the Bay of Plenty Regional Coastal Environment Plan for certain works. The proposed works related to the realignment of an existing electricity transmission line called the Hairini - Mt Maunganui A line which traverses the Maungatapu peninsula, the Tauranga Harbour at Rangataua Bay and the Matapihi peninsula to an alignment which would generally follow State Highway 29A, including above the existing bridge on that highway between the two peninsulas.

[3] On 14 April 2020, the Environment Court issued its decision refusing the appeal and confirming the grant of the consents, subject to amended

conditions.[1] The question of costs was reserved, with the Court stating:

> [273] Costs are reserved. We consider that the issues raised at the hearing were important and deserving of consideration on appeal before us. For that reason we do not encourage any application for costs. If any party wishes to apply for costs, then that application must be filed and served within 15 working days of the date of issue of this decision. Any response by the person against whom costs are sought may be filed and served within 10 working days of the date of receipt of the application for costs.

[4] No application for costs was made at that time.

[5] TEPS, supported by the Trust, appealed against the decision of the Environment Court to the High Court. On 27 May 2021, the High Court issued its decision upholding the appeal.[2] The High Court found material errors in the Environment Court's decision, quashed it and remitted the appeal to the Environment Court for further consideration consistent with the High Court's judgment. In its summary, the High Court said:

> [3] … But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. …

[6] Transpower sought leave to appeal the High Court's decision to the Court of Appeal on a number of questions, principally including whether the High Court could lawfully overturn the Environment Court's factual findings as an error of law. In its decision dated 4 February 2022[3] the application for leave to appeal was declined by the Court of Appeal because:

> That question turns on a fact-specific assessment of the sufficiency of the evidence on which the Environment Court made its conclusions.

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1 *Tauranga Environmental Protection Society Inc v Tauranga City Council and ors* [2020] NZEnvC 043.

2 *Tauranga Environmental Protection Society Inc v Tauranga City Council and ors* [2020] NZHC 1201.

3 *Transpower v Tauranga Environmental Protection Society Inc and ors* [2022] NZCA 9.

> Sufficiency of evidence does not raise a question of general importance, or otherwise meet the criteria in s 303 [*of the Criminal Procedure Act 2011 which governs such applications for leave to appeal*]. It does not justify consideration by this Court.

[7] The matter was accordingly to be remitted to the Environment Court for further consideration in accordance with the High Court's judgement. By memorandum dated 9 March 2022, however, counsel advised that Transpower had provided written notice to the District and Regional Councils under s 138 of the RMA to surrender the resource consents that had been granted by the Councils' independent commissioners and were the subject of the proceedings. The memorandum of counsel included the following explanation:

> 2. Notwithstanding that the High Court confirmed that the effects (i.e. both positive and negative) of the proposal on the ONFL at Rangataua Bay are to be assessed on an overall basis, it went on to find [*referring to paragraph 2 of the High Court's decision*]:
>
> (a) When the view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance and on Māori values of the ONFL, it is not open to the Environment Court to decide that it would not;
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> (b) There are cultural bottom lines in the RCEP; and
>
> (c) The technical feasibility of alternatives to the proposal means avoidance of adverse effects on the ONFL at Rangataua Bay is possible. Policy NH(1)(b) is therefore not satisfied and consideration under Policy NH5 is not available.
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> 3. In light of these findings of fact and law, Transpower does not consider that there is a viable consenting pathway for the realignment project. Alternative options and alignments have been comprehensively assessed and are either unworkable or too costly for Transpower to justify, and these and localised pole moves are also highly likely to be outside the scope of the present application.

[8] The surrender of the consents means that there is no longer any subject matter for the appeal and accordingly no rehearing can occur. The only outstanding issue is whether costs should be awarded to TEPS and the Trust in this proceeding.

Costs in the Environment Court

[9] Under s 285 of the Resource Management Act 1991, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. There is no scale of costs under the RMA. The Environment Court Practice Note 2014 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or practice.[4]

[10] There is no general rule in the Environment Court that costs follow the event.[5] The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it would be fairer to depart from that rule.[6] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[7] The Court does not normally award costs against public bodies unless they are found to have acted unreasonably or to have breached a duty,[8] such that its actions are blameworthy.[9]

[11] 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.[10]

[12] In determining the quantum of costs awards the Environment Court has

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4 *Canterbury Regional Council v Waimakatiri District Council* [2004] NZRMA 289 at [21].
5 *Culpan v Vose* A064/93.
6 *Culpan v Vose* A064/93.
7 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
8 Environment Court Practice Note 2014 at 6.6(c); and *Darroch v Northland Regional Council* (1993) 2 NZRMA 637 (PT).
9 *Emma Jane Ltd v Christchurch City Council* Decision No. 020/09.
10 *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.

declined to set a scale of costs. The range of cases that come before this Court is so great and the circumstances of proceedings are so diverse that devising a fair scale would be at least very difficult and likely to have so many exceptions that it could not truly be used as a scale. Nonetheless, experience has shown that many of the Court's awards have tended to fall within four bands, as follows:

(a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;

(b) 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");

(c) higher than standard costs, where certain aggravating factors are present as discussed below; and

(d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[13] Paragraph 6.6(d) of the Court's Practice Note lists five potential aggravating factors that are given weight in the assessments of whether to award costs and what the quantum should be if they are present in a case. These factors, as identified by the High Court in *DFC NZ Ltd v Bielby*,[11] are:

(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

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

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; and

(e) where a party takes a technical or unmeritorious point.

The application for costs

[14] TEPS and the Trust seek costs against Transpower and the Councils. They seek an award of $38,500, being approximately half of their actual costs. They submit that the Environment Court's original decision was quashed by the High Court so that it must follow that any finding made by this Court or position taken before this Court that would be relevant to the determination of costs (including that no costs be awarded) must also be set aside. They submit that therefore the issue of costs remains outstanding in respect of what are now unresolved proceedings before the Environment Court.

[15] TEPS and the Trust further submit that, because of the surrender by Transpower of its consents, they have been denied the opportunity to have their case determined by the Environment Court. They submit that the explanation Transpower provided to the Environment Court is nothing less than acceptance that TEPS has been successful in its case on appeal to the Environment Court. They say that this acceptance has come "late in the piece" and that judgement should therefore be given by the Environment Court in the Appellant Group's favour, with costs. Counsel submits that in terms of awarding costs where a consent is surrendered, this case is on all fours with *Ngāti Pikiao Environmental Society Inc v Bay of Plenty Regional Council*.[12]

[16] In the *Ngāti Pikiao* case the Rotorua District Council had obtained

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12 *Ngati Pikiao Environmental Society Inc v Bay of Plenty Regional Council* [2013] NZEnvC 116.

resource consents for its municipal wastewater treatment and disposal system. Three appeals were lodged against the grant of those consents. The substantive hearing of the appeals had been in train for nearly a week and the presentation of the District Council's case had been completed when the proceeding was adjourned following the presentation of evidence called by an appellant about cultural effects in a private session of the hearing. Ten days later counsel for the District Council advised that the Court could allow the appeals and cancel the decision granting the consent. There was opposition to this and two months later the Court was advised that the District Council had surrendered its consents. It was suggested that the Court still had jurisdiction to make a substantive decision. Two appellants sought costs.

[17] The decision in that case holds that while the surrender of a consent during the appeal process removes the Court's jurisdiction to cancel the grant of consent, the right of any party to seek costs remains and so the Court may determine any such application.[13] In addressing those applications for costs the Court identified a number of concerns about the approach taken by the District Council in its dealings with tāngata whenua which the Court characterised as high-handed, and in the presentation of its case which the Court found misleading. Awards substantially higher than standard costs were ordered.

[18] TEPS and the Trust also seek an uplift to the award of costs on the grounds that Transpower's case, when properly approached on the basis determined by the High Court, was without substance or merit. They suggest that would have been clear to Transpower well before the Environment Court hearing and so Transpower should have surrendered its consents at that point rather than waiting until March 2022. They further submit that the Councils do not have particularly "clean hands" in this case and so should also contribute to any costs award, perhaps as much as some 20% of the total of

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13 Fn 12 at [24].

any costs awarded.

Transpower's and the Councils' responses

[19] Transpower and the Councils oppose any award of costs and submit that costs should lie where they fall. They submit that the surrender of the resource consents prior to a rehearing following a High Court appeal should not give rise to circumstances which justify costs being awarded in the court below to the party which succeeded in the High Court on appeal. Costs relating to the High Court proceeding were awarded and have been paid. They submit that the *Ngati Pikiao* decision should be distinguished on the basis that Transpower has surrendered the consents in this proceeding prior to any substantive steps being taken on the referral back.

[20] Transpower submits that there are no aggravating or other adverse factors present such as those identified in *DFC v Bielby* and the Court's Practice Note that would justify a costs award, let alone an award of higher than normal costs. Transpower submits that it was justified in bringing its application on its understanding of the circumstances and the law at that time.[14]

[21] The Councils submit that this is not a case where the established principle that costs should not be awarded against a council acting in its regulatory capacity should be put aside as this is not a case where the Councils have acted unreasonably or neglected their duties. They say that their conduct throughout has been appropriate, in line with established authority that first instance decisions should be defended, unless there is good reason to justify a change in position.[15]

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14 *Cooke v Auckland City* EnvC Auckland, A45/97, 2 April 1997.
15 *Auckland Council v Auckland Council* [2020] NZEnvC 70 at [27].

Is an award of costs appropriate?

[22] Having considered the submissions for and against an award of costs, I find that costs should lie where they fall. I do not consider it appropriate to revisit costs relating to the earlier hearing in the Environment Court. The setting aside of the Court's decision by the High Court does not require that the issue of costs in relation to the earlier stage of the proceeding be reopened. The Environment Court discouraged any application for costs in its original decision and none was made. Costs in relation to the High Court appeal are, respectfully, for that Court to determine under its own costs regime. Transpower and the Councils have accepted that TEPS was successful in the High Court and costs in that proceeding have been determined and paid.

[23] This case is not at all comparable with the *Ngati Pikiao* case. Procedurally the cases are quite different. In that case at the end of the first week of the hearing counsel for the consent holder submitted that the appeal should be allowed and the decisions granting consents be cancelled. Effectively, the applicant surrendered its consents partway through the hearing, apparently on realising that the evidence of cultural effects given in private required it to do so. I accept that in *Ngati Pikiao* it was open to the Court to award costs against the applicant as the hearing of the proceeding had commenced before it. As well, in that case the Court expressed significant concerns about the way in which the consent holder and one of its witnesses had behaved. There has been no finding of inappropriate or misleading conduct in this case against Transpower or the Councils.

[24] In this case, Transpower had been successful at first instance and in the first appeal hearing before this Court. While the High Court on a second appeal on questions of law reviewed the findings of fact and determined that errors had been made by this Court, it did not substitute a new decision: instead, it referred the proceeding back to this Court for a further assessment of it, including of the alternatives that might have been available for the

realignment of the transmission line. Transpower then surrendered its consents before the rehearing contemplated by the High Court had been set down or any other substantive steps had been taken in relation to that rehearing. Transpower has therefore avoided the need for a rehearing and for parties to incur any costs in relation to it.

[25] The Court cannot speculate as to the possible outcome of any rehearing in accordance with the decision of the High Court, particularly when it cannot proceed due to surrender of the consents. As identified above, the High Court noted that further evidence on alternatives would likely be required, along with further consideration as to the practicality or possibility of those.[16] The Court has no evidence or submissions before it for the rehearing. Counsel for Transpower has advanced reasons why it has surrendered its consents but there has been no hearing to test those reasons, which appear to be inconsistent with the expectation of the High Court.

[26] I reiterate that there is no general practice in the Environment Court to award costs to a successful party simply because they have been successful. In a significant sense this approach reflects the wider public interest which is essential to the purpose of the RMA, rather than basing the discretion simply on the more private "party versus party" approach to costs in the general civil courts. In any event, I would not describe one side as having wholly succeeded over the other in this case. Two issues of significance were at stake: the maintenance and enhancement of nationally important infrastructure and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga taking into account the principles of Te Tiriti o Waitangi. Although Transpower has now surrendered the consents I do not consider that this unequivocally signals success by TEPS and the Trust in that wider context. Each party succeeded on some points and not on others.

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16 Fn 2 at [3] and [163].

[27] None of the aggravating factors listed in *DFC v Bielby* and the Court's Practice Note, or as found in the *Ngāti Pikiao* case, are present. I do not accept that Transpower's position lacked substance or was without merit. I find that it was justified in bringing the application based on its understanding of the circumstances and the law at the time that it did so. Transpower had good cause to consider its application tenable. The independent commissioners for the Councils granted the consents and the Environment Court confirmed the grant of consents on an overall assessment having regard to the effects on the environment of the proposed works (including receiving and assessing the evidence of adverse cultural effects) compared to the status quo and after considering the relevant provisions of all the statutory planning documents. The Environment Court stated in its original decision that the issues raised were important and deserving of consideration on appeal.[17] While the High Court identified errors in the Environment Court's decision, it did not consider the position to be one where the grant of consent was impossible or even unlikely and it expected that further investigation of alternatives would be undertaken.

[28] I accept that it was only after the High Court's different findings that Transpower felt its application was unsustainable and it then surrendered the resource consents that had been granted by the independent commissioners for the Councils. I consider the consents were surrendered in a timely manner so that no issue of costs arises following the referral of the case back to this Court.

[29] The Councils' conduct has been appropriate and they have not neglected their duties. They were entitled to defend their joint first instance decision. The Council's conduct has not reached the blameworthy threshold which would justify an award of costs against a consent authority by this Court.

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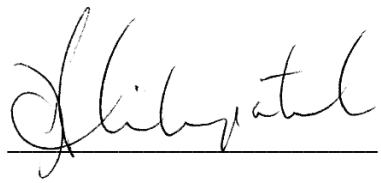
17 [2020] NZEnvC 043 at [273].

[30] Overall, I do not consider an award of costs to be appropriate in this case and I therefore decline to exercise the Court's discretion to award costs.

Outcome

[31] Under s 285 of the Resource Management Act 1991 the Environment Court declines the application by Tauranga Environmental Protection Society Incorporated and the trustees of the Maungatapu Marae Trust for costs against Transpower New Zealand Limited, the Tauranga City Council and the Bay of Plenty Regional Council.

[32] Costs are to lie where they fall.



D A Kirkpatrick
Chief Environment Judge