IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 102

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED
	(ENV-2017-CHC-90)
	Appellant
AND	WEST COAST REGIONAL COUNCIL AND BULLER DISTRICT COUNCIL
	Respondents
AND	STEVENSON MINING LIMITED
	Applicant

Court:	Environment Judge P A Steven
Hearing:	Sitting alone in Chambers under s279 of the Act
Last case event:	5 April 2024
Date of Decision:	10 May 2024
Date of Issue:	10 May 2024

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 RMA, Stevenson Mining Limited is ordered to pay Royal Forest

and Bird Protection Society of New Zealand Incorporated the sum of $113,214.69.

B: Under s285 RMA, Stevenson Mining Limited is ordered to pay the Director-General of Conservation the sum of $103,724.85.

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

REASONS

[1] This is a decision on applications for costs by Royal Forest & Bird Protection Society of New Zealand Incorporated (F&B) and the Director-General of Conservation (D-G). The applications follow the court's decision declining to grant resource consent to Stevenson Mining Ltd (Stevenson) to undertake open-cast mining at Te Kuha. Costs were reserved.[1]

Quantum of costs being sought

F&B

[2] F&B seeks the sum of $301,474.82, comprising 33% of legal costs incurred ($20,592.00) and full expert costs ($280,674.82) where all except one of the experts were external consultants. The consultants' invoices are attached to the application, although Ms Sitarz's costs are based upon a charge out rate of $70 per hour.

[3] A summary of the grounds for the application, which are based upon the presence of *Bielby* factors, are that:

(a) it would be just to recompense F&B for the costs it incurred in its

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[1] *Royal Forest and Bird protection Society of New Zealand Inc vs West Coast Regional Council* [2023] NZEnvC 68.

successful appeal;

(b) Stevenson sought to rely on a biodiversity compensation model put forward in rebuttal evidence that F&B had to respond to, although that was unmeritorious and of no assistance to the court;

(c) Stevenson should have reassessed its case and realised it was highly unlikely that consent could be granted once the National Policy Statement for Freshwater Management (NPS-FM)[2] and West Coast Regional Policy Statement (RPS) provisions had become operative;

(d) failure to reassess the application meant that Stevenson advanced arguments in relation to the interpretation of these instruments that were unmeritorious;

(e) Stevenson conducted its case in a way that unnecessarily lengthened the case management process, adopting the reasoning set out in the application by the D-G.

D-G

[4] The D-G seeks the sum of $182,912.68, being 58% of the costs incurred, comprising indemnity costs of its expert witnesses, and one-third of the costs of (two) legal counsel. The D-G's application is also based on the presence of *Bielby* factors.

Relevant background

[5] F&B had filed an appeal against a first instance decision to grant resource consent, dated 21 November 2017. The D-G joined the appeal under s274 RMA. The hearing was originally scheduled for July 2018 although that was adjourned (at Stevenson's request) pending other superior court litigation. By that time evidence had been exchanged between the parties.

[6] Despite being unsuccessful in securing access arrangements, Stevenson

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[2] Relying on both the 2020 and 2022 versions of the NPS-FM.

decided to proceed with its application, albeit with modifications to the compensation package. However, when Stevenson sought to have the hearing set down, F&B and the D-G sought that the appeal remain adjourned until Stevenson had secured alternative access arrangements.

[7] The appeal remained on hold although in 2021 the appeal was transferred to a different division of the court. The court issued a Minute directing that parties take steps to bring the appeal to a hearing, which occurred in August 2022.

[8] By then, (on 17 June 2020) the Environment Court had issued a record of determination resolving a number of appeals to the RPS. That determination inserted a rewritten Chapter 7 on Indigenous Biodiversity (inter alia), provisions of which were central to the court's decision to uphold the F&B appeal, together with provisions of the (then) newly promulgated 2020 NPS-FM. Neither of these instruments applied when the evidence was first exchanged in 2018. Accordingly, replacement evidence had to be prepared in advance of the rescheduled hearing.

[9] After the hearing, further legal submissions were provided by the parties following a further revision of the NPS-FM in December 2022.

[10] Following receipt of the cost applications, Stevenson:

(a) filed an appeal to the High Court against the court's decision, on 11 May 2023;
(b) lodged a memorandum opposing the cost applications together with a (successful) application for a stay of the court's consideration of costs pending determination of the High Court appeal; and
(c) subsequently abandoned the High Court appeal on 27 February 2024.

[11] Following abandonment of the High Court appeal, the court issued a Minute allowing F&B and the D-G to file a reply to Stevenson's response to the application by 5 April 2024, consistent with cl 10.7(n)(iii) of the Environment Court Practice Note 2023 (the Practice Note). Further submissions were lodged

with the court.

Stevenson's opposition

[12] Stevenson opposes each application on (essentially) the same grounds, which in summary are that:

(a) the collective sum being sought by the parties is excessive (being almost $500,000), noting that an indemnity award is being sought by the D-G for witness costs;
(b) Stevenson could not have seen "the writing on the wall" when the 2020 NPS-FM was introduced, such that it's application should have been withdrawn;
(c) it conducted its case in a careful, focused and considered manner, focusing on the potential positive effects which were considered to outweigh the adverse ecological effects, not in a blameworthy manner as F&B and the D-G contend;
(d) in relation to in-house costs sought to be recovered by the parties, the standard approach of not including the same in a costs award should be followed;
(e) in any event, the parties have not supplied sufficient detailed evidence of the costs actually incurred;
(f) any award in favour of F&B ought to account for the funding received from the Environmental Legal Assistance Fund (ELA);
(g) the hearing was a test case on the chapter 7 RPS provisions, which counts against any award of costs been made; and
(h) if an award is made, costs of various of the witnesses ought to be excluded from the court calculations.

Legal principles on costs

[13] The applications each refer to provisions of the Practice Note that are a guide to the exercise of the court's discretion on costs under s285. As noted in

the F&B application, the general cost principles which are encapsulated in the Practice Note are well settled. These have been summarised by the High Court in *Auckland Council v Loranger*:[3]

> [30] The Environment Court's power to award costs is found in s285 of the RMA. Relevantly, it provides as follows:
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> > **285 Awarding costs**
> > (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.
> > …
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> [31] The section confers a broad discretion on the Environment Court. The only qualification is that the quantum of costs awarded must be reasonable. Notably, there is no statutory requirement that costs be awarded. Nor is there a presumption that the successful party should be awarded costs.
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> [32] It was nevertheless common ground between counsel that:
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> (a) the discretion – whilst broad – must be exercised on a principled basis. In this regard, all counsel referred to the Environment Court's Practice Note in relation to costs issued in 2014. It was acknowledged that the Practice Note is not prescriptive; rather it is a guide;
> (b) a two-stage approach is customarily taken by the Environment Court – should costs be awarded and if so, in what sum?;
> (c) in considering a costs award, what are known as the *Bielby* factors can be relevant. These factors derive from a decision of this Court – *Development Finance Corporation of New Zealand Ltd v Bielby*. The Court there identified various factors which can be relevant in awarding costs. They are as follows:
> (i) whether arguments were advanced that were without substance;
> (ii) whether the process of the Court has been abused;

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[3] *Auckland Council v Loranger* [2022] NZHC 3242, at [30]-[33].

(iii) whether the parties have failed to comply with the rules or Court orders in respect of procedural matters;

(iv) whether a case has been poorly pleaded or presented. This includes conducting a case in such a manner as to unnecessarily lengthen the hearing;

(v) whether a party has failed to explore the possibility of settlement where a compromise could have been reasonably expected to ensue, or where a party has unreasonably or obdurately resisted a settlement;

(vi) whether a party has taken a technical or unmeritorious point or defence and failed;

(d) where the Environment Court considers that an award of costs is appropriate, in determining quantum, it often adopts, de facto, a three-band approach:

(i) standard costs (normally between 25 and 33 per cent of the reasonable costs sought);

(ii) higher than standard costs (appropriate where aggravating or adverse factors, such as the *Bielby* factors, are present); and

(iii) indemnity costs (awarded rarely and only in exceptional circumstances); and

…

[Footnotes omitted]

[14] As further noted in the F&B application, the *Bielby* factors now overlap with those in the Practice Note in cl 10.7(j) as set out above. Consideration of the *Bielby* factors was queried by the High Court without also referring to the High Court and District Court Rules costs scales for guidance in *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* (*BW Offshore*).[4] In the interest of acting consistently with well-established principles in this s285 context, the Environment Court has continued to refer to the *Bielby* factors, where relevant.

Implications of the ELA funding

[15] The application by F&B disclosed that it had received ELA funding.

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[4] *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577.

However, citing previous Environment Court decisions, counsel submits that this factor is irrelevant to the question of costs. Counsel refers to *Mills v Queenstown-Lakes District Council*,[5] where the court observed that the grantee was obliged under the general law to return to the Ministry for the Environment any surplus arising from an award of costs. That approach was followed in *Canal v Rodney District Council* and in *Clearwater Mussels Ltd v Marlborough District Council.*[6] Stevenson submits that the level of grant from the ELA fund should be deducted from the total of any cost award. No authority is cited to suggest that the decisions cited by F&B should not be followed.

Court's consideration

[16] F&B's application will be considered on the basis that the ELA funding is irrelevant to the determination on costs.

Costs for in-house expert evidence

[17] Stevenson submits that the court is able to grant costs of in-house council employees although as an exception to the standard costs practice. Stevenson submits that should not be allowed in this case as the D-G and F&B's costs are distinguishable from the in-house costs of a council; the D-G and F&B employees are going about their usual business in their involvement in the hearing; and that the Practice Note at 10.7(j) points against it.

[18] Cases referred to against awarding costs include:

(a) *Queenstown Lakes District Council v Thompson.*[7] This was an enforcement proceeding. The court found costs of salaried employees are not appropriate for an award of costs because salaries are payable

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[5] *Mills v Queenstown Lakes District Council* [2005] NZRMA 241.

[6] *Canal v Rodney District Council* ENC Auckland A084/08, 28 July 2008; *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 109.

[7] *Queenstown Lakes District Council v Thompson* ENC Christchurch C007/97, 30 January 1997.

regardless of the work the employees are undertaking;

(b) *Doig v Marlborough District Council* (*Doig*).[8] Stevenson relies on *Doig* in support of the submission that it is not generally appropriate to award costs for salaried council officers although allowance is usually made for the costs of council-employed expert witnesses"; and

(c) *Te Awanga Lifestyle Limited v Hastings District Council.*[9] This was an appeal against the Council's decision to decline resource consent. The court found that even though officers were engaging in their normal duties, the Council did not incur any extra cost by reason of them undertaking those duties. Thus, the court did not consider it is appropriate to encourage councils to claim costs to recompense them for officer salaries.

[19] The D-G and F&B submit that it is a standard principle that costs of in-house expert witnesses are recoverable. They submit that the differences between the role of the parties and a council do not count against this standard principle. They submit that their employees were not going about their usual business in their involvement in the hearing.

[20] Cases referred to in support of awarding costs include:

(a) *Humphrey v Whangarei District Council* (*Humphrey*).[10] This was an appeal against a private plan change. The Council sought to recover the costs of in-house staff who prepared evidence. The court granted the award of costs and found that while staff time is generally not compensated, where expert evidence is required, this is a cost that can be considered;

(b) *Kombi Properties Ltd v Auckland Council.*[11] This was an appeal against

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[8] *Doig v Marlborough District Council* [2018] NZEnvC 162.
[9] *Te Awanga Lifestyle Limited v Hastings District Council* [2015] NZEnvC 15.
[10] *Humphrey v Whangarei District Council* ENC Auckland A075/98, 26 June 1998.
[11] *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 92.

the Council's decision to decline resource consent. The court found that "where the council officer gives evidence that assists the court's proper evaluation of RMA instruments and related principles, it is legitimate to pursue recovery".[12] Also, if the costs cannot be recouped, it will fall on ratepayers (although that was not determinative of the outcome); and

(c) *McIntyre v Canterbury Regional Council* (*McIntyre*).[13] Costs were granted to in-house experts (although this was unopposed).

[21] *Doig* was also cited by F&B and D-G in support of an award, in addition to *Stone v Hastings District Council* (*Stone*),[14] which relied on *Doig* in awarding costs of council employees. *Stone* involved an appeal against the Council's decision to decline consent for a two-lot rural subdivision. The court found that the Council's in-house costs were reasonable and could remain in the total sought.

[22] Unlike a council, F&B and the D-G each submit that they do not have specific statutory functions in relation to a consent application under the RMA. However, they are entitled to participate as a submitter in accordance with s96 RMA, and continue to initiate or join an appeal in the Environment Court. Just like any other appellant or s274 party, the parties should be entitled to claim for costs they incurred in involvement in the Environment Court proceedings. F&B and the D-G state that Stevenson's opposition is based upon decisions concerning councils, rather than appellants or s274 parties, and those decisions are able to be distinguished.

[23] The D-G in reply also refers to the following cases where the D-G applied for costs, including in-house costs, and was not told it was inappropriate, unfortunately no reason was given behind the granting of the costs:

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[12] *Kombi Properties Ltd v Auckland Council* [2021] NZEnvC 92, at [38].
[13] *McIntyre v Canterbury Regional Council* [2018] NZEnvC 28.
[14] *Stone v Hastings District Council* [2019] NZEnvC 175.

(a) *Friends of Sherwood Trust v Auckland Council.*[15] Sherwood filed an enforcement order against Auckland Council and the Department of Conversation (DOC) who were planning a pest control operation by drop of 1080. The Council and DOC sought and won costs against Sherwood. The Council sought costs as it was concerned that they will otherwise fall on ratepayers. DOC also sought full reimbursement of expert costs. Judge Harland (as she then was) granted the DOC costs with no discussion;

(b) *Director-General of Conservation v Ferguson.*[16] The D-G applied for declarations regarding development work that the Fergusons were undertaking on their property adjacent to Lake Brunner. The D-G won and was awarded costs. There was no discussion on in-house experts; and

(c) *Aquamarine Ltd v Southland Regional C*ouncil.[17] Aquamarine applied to the Council for consents to export fresh water from Lake Manapouri. The Council declined the consents and Aquamarine appealed the decision; the D-G joined as a party. The Council's decision was upheld on appeal and the D-G applied for costs. No submissions were filed in opposition. Costs were granted. There was no discussion on in-house experts.

Consideration

[24] Under s285 of the Act, the court can 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. This is a broad discretion. If costs are awarded, they are not a penalty against an unsuccessful party, but rather they are compensation to a successful party for the costs it has

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[15] *Friends of Sherwood Trust v Auckland Council* [2019] NZEnvC 120.
[16] *Director-General of Conservation v Ferguson* ENC Christchurch C79/06, 14 June 2006.
[17] *Aquamarine Ltd v Southland Regional Council* ENC Christchurch C105/99, 10 June 1999.

reasonably incurred, if the court considers this is a just outcome.

[25] Stevenson's argument seems to be hedged on the notion that neither party is a council. However, I do not consider that allowing in-house expert costs should be restricted to councils. I agree with the D-G and F&B that it is a standard principle of costs that in-house expert costs are recoverable. As the D-G and F&B were entitled to initiate and join the proceeding, and as they were successful, they are entitled to the costs that they incurred. They should not be restricted in recovering costs simply because they utilised their own staff rather than hiring external experts.

[26] Both the D-G and F&B have outlined that the work undertaken by their expert witnesses was outside of the usual scope of their roles. As stated in *Humphrey*, while staff time is not generally compensated in a costs award, expert evidence at a court hearing is the equivalent of using outside consultants and can be taken into account.

[27] I find that it is a just outcome to award F&B and the D-G costs for their in-house experts.

Costs for in-house counsel

[28] Both F&B and the D-G used in-house counsel.[18] Counsel each submit that this does not prevent recovery of costs for their attendances. F&B refers to High Court decisions where an award of costs associated with in-house counsel has been made, including the decision of *Grant v McCullagh* (*Grant*).[19] In that case, the High Court said:

> [38] I also find that the liquidators are entitled to costs, notwithstanding that the application was brought by in-house counsel. If they had not used in-house counsel, they would have had to engage a law firm and/or counsel, and would

[18] Although the D-G also instructed outside counsel as well.
[19] *Grant v McCullagh* [2013] NZHC 2210.

> have been entitled to an award of costs to reflect those costs. Those costs would be an appropriate disbursement in the liquidation. I see no reason to distinguish the case of work done by in-house counsel on a specific application such as this.

[29] F&B also cites *Norrie as Liquidator of Pakiri Investments Ltd (in Liq) v Sutich*:[20]

> [12] A difficulty arises, however, when a party is not represented by independent counsel but rather represents itself, or appoints in-house counsel for this task. There is a principle that a party may not profit from an award of costs. Hence those who receive legal services free of cost or who perform the work themselves are not entitled to receive costs. The position with in-house counsel is somewhat different however. While in many cases in-house counsel will not be suitable representatives, in other cases, their services will be entirely adequate. These services also come at a cost and so the Courts have repeatedly accepted that an award of costs may be made to cover the expenses associated with in house counsel. Nor are companies required to provide detailed evidence of salaries and time cards in order to qualify. Just as Courts are willing to accept the assurances of counsel that scale costs do not exceed the costs actually billed, they are willing to accept that the cost of in-house counsel exceeds scale costs without evidence to support this conclusion.

[30] In reply submissions, F&B refers to additional cases where a party who had conducted litigation using an in-house lawyer, was able to recover costs; *Henderson Borough Council v Auckland Regional Authority*,[21] *Joint Action Funding Ltd v Eichelbaum*,[22] *McGuire v Secretary for Justice*,[23] and *Royal Forest & Bird Protection Society of New Zealand Inc v Northland Regional Council.*[24]

[31] While none of these cases involve RMA proceedings, counsel submits that there is no principled reason why those cases should not be followed referring to

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[20] *Norrie as Liquidator of Pakiri Investments Ltd (In Liq) v Sutich* [2015] NZHC 2913.
[21] *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA).
[22] *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249.
[23] *McGuire v Secretary for Justice* [2018] NZSC 116.
[24] *Royal Forest & Bird Protection Society of New Zealand Inc v Northland Regional Council* [2019] NZHC 449.

BW Offshore.

Court's consideration

[32] I agree with F&B on this issue. There is no principled reason for taking a different approach in relation to recovery of costs of in-house counsel under the RMA, particularly in light of the observations in *Grant*.

Advanced arguments that were without substance and which were unmeritorious and failed

[33] Both applicants submit that Stevenson ought to have reassessed its case in light of the updates to the RPS (in 2020) and 2020 NPS-FM. Counsel submit that this new policy framework made a grant of consent "all but impossible".

[34] F&B refers to *Canterbury Museum Trust Board v Christchurch City Council*[25] where the Environment Court awarded 20% of costs to the appellant against the applicant who had unsuccessfully defended a grant of consent. The court stated that an applicant should not be penalised for defending a decision granting consent, although the appellant had been successful and, ultimately, was more correct in its interpretation of the relevant plans.

[35] F&B notes that an important factor in the court's decision had been that the applicant had failed to reassess its case after an adverse High Court case that found failings in the way the applicants had exercised its mandate to pursue the project. The Environment Court observed that the applicant should have taken a step back to reassess matters, including "whether its goals were realistic with proper consideration of the constraints that working within a historically significant building imposed".[26]

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[25] *Canterbury Museum Trust Board v Christchurch City Council* ENC Christchurch C111/06, 6 September 2006.

[26] *Canterbury Museum Trust Board v Christchurch City Council* ENC Christchurch C111/06, 6 September 2006, at [13].

[36] Similarly, counsel refers to *Clearwater Mussels Ltd v Marlborough District Council* where the Environment Court found that "hard-headed analysis would have informed the appellants that … the chances of success were slim, and that taking the matter to a full hearing was a risk".[27]

[37] As a further example, counsel refers to *Kircher v Marlborough District Council* where the court made similar observations that an applicant has a choice to review the merits of its application and then decide whether good grounds exist for opposing the appeal, stating that "failure to exercise that sort of judgment simply means that parties are launched irretrievably on expensive litigation that may have little or no merit".[28]

[38] F&B states that the Chapter 7 provisions were settled by agreement following the mediation of appeals, where Stevenson had been a signatory to the consent memorandum filed with the court. Counsel further notes that the Environment Court had issued a determination following receipt of the consent memorandum rather than a consent order, observing that the determination referred to the memorandum of the parties recording their agreement that:[29]

> … Policy 2 sets bottom lines which focus on protecting threatened examples of biodiversity …

[39] The D-G advanced similar arguments. Counsel notes that the Chapter 7 RPS provisions became operative on 24 July 2020, by which time Stevenson would have been acutely aware of the significance of the ecological values present at the Te Kuha site. Evidence describing those ecological values had been served on Stevenson ahead of the vacated hearing in 2018.

[40] Similarly, Stevenson must have been aware of the implications of the directive "avoid" policy in the NPS-FM 2020 in relation to the loss of wetlands,

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[27] *Clearwater Mussels Ltd v Marlborough District Council* [2016] NZEnvC 109, at [30].
[28] *Kircher v Marlborough District Council* [2010] NZEnvC 102, at [17].
[29] *Heritage New Zealand Pouhere Taonga v West Coast Regional Council* [2020] NZEnvC 80, at [92(a)].

and their relevance to the Te Kuha application and the wetlands present on site.

[41] Stevenson resists the applicants' arguments noting that in the context of the *Bielby* factors, the terms "without substance" and "unmeritorious" should be seen as a high bar. Counsel submits that simply because the court does not accept the proposition put forward in submissions or prefers one witness's evidence over another, does not of itself make that proposition and evidence without substance and unmeritorious.

[42] Referring to the RPS Chapter 7 provisions, Stevenson notes that the interpretation of Policy 7.2 advanced by F&B and the D-G was not shared by parties to the mediated agreement or by the respondent Councils. Counsel notes that these parties had been represented by experienced resource management professionals. Stevenson resists the suggestion that the RPS provisions signalled a "writing on the wall". Counsel argues that on the basis of the court's interpretation of the RPS provisions no mine on the West Coast could ever proceed. Stevenson further argues that Policy 7.2 does not create a "bottom line".

[43] Similarly, in terms of the NPS-FM, Stevenson further submitted that the 2020 NPS-FM was not amended in the manner that found against the applicant until December 2022. Stevenson submits that it could not have anticipated that the final version of the 2022 amendments would include provisions that were antagonistic to a new mine, or that the amended provisions would be interpreted to apply retrospectively.

[44] Stevenson's submissions were made in circumstances where, at the substantive hearing, Stevenson had produced an Exposure Draft of (then) proposed amendments to the 2020 NPS-FM, reflecting recommendations of Ministry for the Environment officials that would provide a consenting pathway for a new mine. However, the court's decision records that the court was not prepared to anticipate the changes that *might* be made to the 2020 NPS-FM.

[45] More relevantly, I agree with F&B's submission that what Stevenson has

said about the 2020 NPS-FM is inaccurate; the 2020 version of the NPS-FM was against Stevenson's proposal from its inception. Stevenson's evidence anticipated amendments that would provide a consenting pathway through the otherwise directive provisions, but those did not eventuate.

[46] The NPS-FM 2020 became operative long before the hearing in 2022, around the same time that the Environment Court issued its record of determination reflecting settlement of RPS appeals. As the decision records, the amended RPS provisions included an entirely new chapter on wetlands, in addition to Chapter 7 (on indigenous biodiversity). However, the court had decided that the newly inserted RPS provisions on wetlands were trumped by the directive "avoid" policy in the 2020 NPS-FM, in relation to "... any further loss of wetlands". The court found that the 2020 NPS-FM was *not* supportive of Stevenson's proposal and this conclusion was unaffected by the 2022 amendments.

[47] In the end, the court's s104 evaluation turned (primarily) on the very directive provisions of Chapter 7 of the RPS in relation to indigenous biodiversity (flora and fauna), in addition to the NPS-FM on wetlands. The court rejected Stevenson's argument that positive effects associated with the rehabilitation and mitigation proposals could outweigh evaluations counting against a grant of consent in terms of s104(1)(b) matters.

[48] The court further disagrees with Stevenson's contention that on the basis of the court's approach to the RPS Chapter 7 provisions no mine on the West Coast could ever succeed. The decision notes that some (but not all) of the biodiversity values present on the Te Kuha site were tripped by the differing thresholds in each of Policy 7.2 limbs. However, it is conceivable (albeit speculation on the court's part) that biodiversity values not falling within any of the Policy 7.2 categories could be present on the site of other proposed mines.

[49] Moreover, it is not for the court to second-guess what other parties to the mediated settlement on the RPS appeals understood the Chapter 7 policy suite to

mean when the appeals were settled. It suffices to note that the court's approach to those provisions was aligned with that advanced by F&B and the D-G. Moreover, it was aligned with the position advanced (jointly) for the respondent Councils at the hearing of F&B's appeal.

[50] In opening submissions, counsel acting jointly for the Councils submitted that Policy 7.2 "acts as a gateway" to Policies 7.3, 7.4 and 7.5.[30] The position of witnesses for the Councils was also consistent with the conclusion reached by the court, namely, that Policy 7.2 must be met before the mitigation hierarchy could be considered. Accordingly, if Stevenson is correct about the Councils' position when the RPS appeals were settled, and the court is not in a position to know about that, their position had certainly changed by the time of the hearing in 2022.

Court's consideration

[51] I agree with F&B's overall contention that Stevenson could have anticipated the court's outcome if it had taken a step back and given its case a "hard-headed analysis" based upon the evidence exchanged in 2018, and in light of the (then) recently introduced RPS and 2020 NPS-FM provisions, prior to proceeding to a hearing.

Other matters

[52] As for the other grounds for the applications, I have earlier provided a potted summary of the case management process, noting that all parties, at various times, have contributed to the elongated case management process. This has inevitably resulted in an increase in the costs incurred by all parties. I note that the original adjournment was sought by Stevenson, although neither F&B nor the D-G had raised any opposition to that. Accordingly, while conduct during the case management process can be a relevant consideration, the court does not find that

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[30] Opening legal submissions for the West Coast Regional Council and Buller District Council, dated 4 August 2022, at [5.19].

it is an aggravating feature of Stevenson's conduct bearing on the quantum of costs on this occasion.

[53] The same applies to F&B's allegation that Stevenson sought to rely on a biodiversity compensation model (BCM) put forward in rebuttal evidence that F&B had to respond to. The evidence of the witness for F&B was that a different (quantitative) model ought to have been used, although no alternative model was in fact used by the F&B witness. Witness caucusing was directed by the court, although that did not result in evidence that was helpful. No agreement was reached between the experts that the BCM was useful as a tool for checking the predictions made by Stevenson's experts in the context of the compensation package being promoted. In the end, the evidence of each of the parties was found to be unhelpful.

[54] Whereas the hearing was not strictly a test case on the new RPS provisions, it was the first time that the Environment Court had to consider them in the s104(1)(b) context. As the decision records, there were aspects of the policy suite that were problematic from the court's perspective, particularly due to the process and methodology for SNA identification contemplated by Policy 7.1 and its parent objective. As to that issue the court had not entirely agreed with the positions advanced by F&B and the D-G. As noted in the decision, the court was not satisfied that any of the parties had paid adequate attention to the parent objective of that policy suite, along with Policy 7.1 in relation to the identification of SNAs, that being a crucial step in any evaluation of a proposal. That must also factor into the court's costs consideration.

[55] Stevenson has also resisted the cost applications for reasons including that the first instant decision had been made by a panel chaired by the late Environment Judge Whiting, whose decision was being defended. However, Stevenson overlooks that after the panel had made its decision, the regulatory framework within which the appeal was to be determined was amended in 2020 in ways that were found to be antagonistic to Stevenson's proposal.

[56] In any event, there is no general rule that an applicant is immune from costs if it is defending the Council's decision in its favour, particularly if since the decision was issued there is a material change to the regulatory framework within which the appeal was to be determined.

Court's consideration

[57] The court considers that an award in favour of F&B and the D-G is warranted, the remaining question being what is a reasonable contribution: comfort level? – above comfort level? – or indemnity costs?

Quantum

[58] This is not a case where an award of indemnity costs for the witnesses for either applicant is justified. I find that in light of the new policy instruments, which were not considered at the council stage, Stevenson's litigation strategy involved a high degree of risk. However, I am reluctant to conclude that it was fundamentally flawed from the outset.

[59] No reduction is justified for second counsel instructed given the importance of the issues to the parties, and due to the novelty of the issues.

[60] Stevenson considers that some of the costs of the witnesses for the D-G are based upon excessive time recording for requisite attendances. Stevenson has also challenged recovery of costs in relation to the evidence of experts whose evidence was not central to the court's ultimate decision. However, the court is not in a position to determine what are reasonable time allowances for each of the parties' experts.

[61] Whereas reasonably significant sums are being sought, the costs incurred by each of the parties reflect the fact that very many of the attendances invoiced in 2018 had to be repeated in light of the newly promulgated RMA policy framework. That further cost was incurred by all parties.

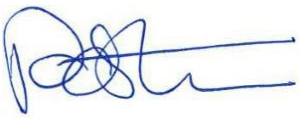
[62] Accordingly, and looking at the applications in the round, I find that an award at the upper level of the comfort level of 33% of all costs incurred by F&B and the D-G is warranted, including the costs of the experts.

Outcome

[63] Under s285 RMA, Stevenson Mining Limited is ordered to pay Royal Forest and Bird Protection Society of New Zealand Incorporated the sum of $113,214.69.

[64] Under s285 RMA, Stevenson Mining Limited is ordered to pay the Director-General of Conservation the sum of $103,724.85.

[65] Under s286 RMA, this order may be filed in the District Court at Westport for enforcement purposes (if necessary).



P A Steven
Environment Judge