IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2024] NZEnvC 086

IN THE MATTER OF	an appeal under s 325 of the Resource Management Act 1991
BETWEEN	AMANDA LAKE
	(ENV-2023-AKL-146)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge SM Tepania
Hearing: Last case event:	On the papers 21 November 2023
Submissions:	A Lake for herself B Magill for Auckland Council
Date of Decision:	19 April 2024
Date of Issue:	19 April 2024

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: The application for costs is granted.

B: Under s 285 of the RMA the Environment Court awards Ms Lake costs of $1,563.75 against Auckland Council.

REASONS

Introduction

[1] On 15 August 2023, Ms Lake filed an appeal against abatement notice ABT21685539 (**the abatement notice**), regarding the removal of sheds and a veranda at 14 Waitaki Street, Henderson, Auckland. The abatement notice was issued on 25 July 2023 on behalf of Auckland Council.

[2] The abatement notice required Ms Lake to "Remove the sheds and veranda to meet the minimum yard boundary" by 25 September 2023. This was due to them being in contravention of s 9(3) of the Resource Management Act 1991 (**RMA**) and Activity Tables H6.4.1 and H6.9.1 of the Auckland Unitary Plan (Operative in Part) (**AUP(OP)**).

[3] On 22 August 2023, an application for stay of the abatement notice was filed. On 6 September 2023, the Court granted the application for stay until 18 October 2023.

[4] On 16 October 2023, the Court received advice from the Council that it had cancelled the abatement notice "due to error". On 18 October 2023, Ms Lake confirmed that she agreed to discontinue the appeal.

The application for costs

[5] On 3 November 2023, Ms Lake filed an application for costs against the Council, seeking costs of $2,347.50 which consist of the following expenses:

(a) filing fee for appeal of the abatement notice, 15 Aug 2023: $250,

(b) application for stay of the abatement notice, 15 Aug 2023: $200,

(c) AL Building Consultants Ltd (**expert**): Work to advise on Notice to Fix (**NTF**) and the abatement notice, 3 Aug 2023: $776.25,

(d) AL Building Consultants Ltd: Work to advise on the abatement notice, 30 Sep 2023: $1121.25.

[6] Ms Lake's submission is that an award of costs is warranted because the Council did not perform its duties and did not act in a fair and reasonable manner.

[7] She relies on Council's agreement that the abatement notice was issued in error and subsequently withdrawn. Ms Lake considers this response was a result of the Council compliance officer rushing the inspection, measuring distances incorrectly (between the fence trellis and the shed area) and inaccurately describing the pergola as "enclosed".

[8] Ms Lake refers to repeated attempts seeking clarification and resolution meetings with the Council, to no avail. She submits that the Council could have acted in a more constructive way, and this would have reduced the costs and time for both parties.

Auckland Council submissions

[9] The Council opposes the application for costs and submits that costs should lie where they fall. In summary, the Council submits that:

(a) Ms Lake is a self-represented litigant and is therefore not entitled to an award of costs. In support of this submission the Council referred to *McGuire v Secretary for Justice*,[1] where the Supreme Court held that self-represented litigants are not entitled to an award of costs. The Council also referred to *Sandilands v Manawatu District Council*,[2] where the Environment Court acknowledged the established rule that lay litigants are not entitled to an award of costs but held that reasonable disbursements can be awarded at the discretion of the Court.[3]

(b) the costs sought in relation to the expert are unreasonable as they relate to advice sought prior to these proceedings. The Council's position is that costs can only be sought in relation to costs incurred in the proceeding,

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[1] [2018] NZSC 116.
[2] EnvC Wellington W55/2001,19 July 2001.
[3] *Sandilands v Manawatu District Council*, EnvC Wellington W55/2001, 19 July 2001 at [22].

not matters undertaken prior to the hearing of the proceeding.[4]

(c) the costs sought in relation to the NTF can be put to one side as it is a separate issue and forms part of separate proceedings that are governed under the Building Act 2004.

(d) clause 10.7(d) of the Environment Court Practice Note 2023 provides that the Court will not normally award costs against a public body unless it has failed to perform its duties properly or has acted unreasonably. The Council did not act unreasonably or in bad faith. As soon as it became aware of the technical error relating to the measurements of the boundary line and the pergola, it withdrew and cancelled the abatement notice offering to cover Ms Lake's disbursement and filing fees.

(e) this matter resolved at an early stage of the proceedings, directly after the parties met and conferred on the appeal. This supports the Council's position that costs should lie where they fall.[5]

Costs in the Environment Court

[10] Under s 285 of the RMA, 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 2023 sets out guidelines in relation to costs. However, the Practice Note does not create an inflexible rule or practice.[6]

[11] There is no general rule in the Environment Court that costs follow the event.[7] 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.[8] The purpose of a costs award is not to

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[4] Environment Court Practice Note 2023, 10.7(c) and *Brownlie v Northland Regional Council* [2017] NZEnvC 33.
[5] *Trotter v Brain* [2015] NZENVC 150 at [14].
[6] *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].
[7] *Culpan v Vose* PT Auckland, A064/93, 17 June 1993.
[8] *Culpan v Vose* PT Auckland, A064/93, 17 June 1993.

penalise an unsuccessful party but to compensate a successful party where that is just.[9]

[12] 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]

[13] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. 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.

[14] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessment of whether to award costs and what the quantum should be if they are present in a case:[11]

(a) where arguments are advanced without substance;

(b) where the process of the Court is abused;

(c) where the case is poorly pleaded or presented, including conducting a case in such a manner as to unnecessarily lengthen the hearing;

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[9] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
[10] *Re Queenstown Airport Corporation Limited* [2019] NZEnvC 37.
[11] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587.

(d) where it becomes apparent that a party has failed to explore the possibility of settlement where compromise could have been reasonably expected;

(e) where a party takes a technical or unmeritorious point and fails; and

(f) whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

Costs against councils

[15] The well-established principle of costs is that they will not be awarded against a statutory decision-maker in the absence of special circumstances.[12] 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.[13]

[16] '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 its findings, thereby adding to the costs of the applicant.[14]

Costs sought by lay litigants

[17] The general rule is that lay litigants are not awarded costs other than disbursements unless there are exceptional circumstances.

[18] This is true as a general premise, although it relates to claims for costs concerning the lay litigant's own time to prepare and conduct the case. A lay litigant may still seek an award of costs in relation to the costs incurred seeking the advice of a professional.[15]

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[12] *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 at [12].
[13] Practice Note 2023, clause 10.7(d).
[14] *Contact Energy Ltd v Waikato Regional Council* [2002] NZRMA 12.
[15] *Re Westland District Council* [2013] NZEnvC 154, at [16].

The timing of the costs incurred

[19] The Council contends that the legal costs cannot be awarded under s 285 of the RMA since they were incurred prior to the proceeding being commenced in the Environment Court. However, the Court may award the costs arising directly out of the proceeding. This includes the costs connected with preparation of appeal documents and supporting affidavits. What is exempt are the costs associated with preliminary negotiations and dealings pre-dating the proceeding. These are not the appropriate subject of a costs award.[16]

Should there be an award of costs?

[20] As soon as the Council became aware of the technical error relating to the measurement of the boundary line and pergola, following the mediation process, the Council withdrew and cancelled the abatement notice.

[21] While there is nothing in the material before the Court that establishes that the Council acted in bad faith or in a blameworthy manner in this appeal, the issuing of an abatement notice is a serious step. Non-compliance can lead to further enforcement action, for example prosecution. Care needs to be taken by a Council to satisfy itself that circumstances exist that justify the issue of an abatement notice.

[22] I have read Council's memorandum. There is no suggestion that the evidence Ms Lake has provided is inaccurate insofar as it reflects ongoing attempts to engage with Council to seek some explanation or basis for the abatement notice, prior to proceedings being filed in this Court.

[23] I note the Council's reference to this Court's findings in *Trotter v Brain*[17] that: [18]

> Where negotiations take place and lead to a resolution without a hearing, costs are unlikely to be awarded. It would be an extreme case where the Court awarded costs in these circumstances.

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[16] *Re Westland District Council* [2013] NZEnvC 154, at [17]-[18].
[17] *Trotter v Brain* [2015] NZEnvC 150.
[18] *Trotter v Brain* [2015] NZEnvC 150, at [14].

[24] This is not a case where negotiation has occurred in order to bring a matter to a resolution but the first opportunity at which the applicant was able to have Council engage properly with her. The Council acknowledges that there was a technical error relating to the measurements of the boundary line and the pergola which Ms Lake has stated from the outset.

[25] Given there was an error in bringing the abatement notice, I find it appropriate that an award of costs be made to Ms Lake. I accept that there cannot be any award relating to her participation in mediation and I do not consider there are any aggravating factors which might justify an award of costs that are higher than is standard.

[26] However, I do consider that as Ms Lake attempted, without success, to obtain clarification from the Council as to the matters behind the abatement notice before seeking redress through the Court and has had to go to the lengths of filing an appeal against the abatement notice in order to have proper engagement with the Council, she should be awarded the costs she incurred. Those costs arise from Ms Lake's efforts to bring to the Council's attention matters that should have been taken into account before the abatement notice was issued and prior to this appeal being filed. A defence cost as compared to a cost arising out of a mediation, they are notionally a disbursement.

[27] I am not prepared to award reimbursement of the full cost of the expert invoices as that could be considered tantamount to an award of indemnity costs which this Court awards very rarely and which I do not consider are appropriate particularly as the Council has not acted unreasonably or in bad faith. Something above the comfort zone however is warranted. I consider 75% sufficient.

[28] The costs incurred in relation to the NTF are to be excluded from the award as they do not relate to this proceeding. To reflect this I deduct the $262.50 associated with the NTF from the $776.25 incurred in relation to the services of AL Building Consultants Ltd on 3 August 2023 from the amount awarded.

Outcome

[29] Under s 285 of the RMA the Environment Court awards Ms Lake costs of $1,563.75 against Auckland Council.

SM Tepania
Environment Judge